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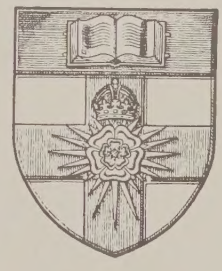

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Page	*Line*	*For*	*Read*
57	title of case	STEAD *v.* AYKROYD	STEAD *v.* ACKROYD
59	20	*Knowles Stanbury*	*Noël Stansbury*
353	footnote	delete 631	
381	,,	[1908] 1 K. B. 776	[1908] 1 K. B. 766

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1911, will be as follows:—

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
A. G. Mulliner Motor Body Company, Jackson *v.*	546
Ackroyd, Stead *v.*	57
Anderson, In re	896
Angel *v.* Jay	666
Anson, Denaby and Cadeby Main Collieries, Ld. *v.* (C. A.)	171
Astley *v.* R. Evans & Co., Ld. (C. A.)	1036
Attorney-General, Dyson *v.* (C. A.)	410
——— *v.* Exeter Corporation	1092

B.

Bagley, In re (C. A.)	317
Baker, Williams *v.*	566
Ball, Rex *v.* (C. C. A. & H. L.)	461
——— *v.* William Hunt & Sons, Ld. (C. A.)	1048
Bates, Rex *v.* (C. C. A.)	964
Batt *v.* Metropolitan Water Board	845
Becher, United Mining and Finance Corporation *v.* (C. A.)	840
Bennetts, Remorquage à Hélice (Société Anonyme de) *v.*	243
Bermondsey Bioscope Company, London County Council *v.*	445
Biddell Brothers *v.* E. Clemens Horst Company	214
——— *v.* ——— (C. A.)	934
Billericay Rural Council *v.* Poplar Union	734
Bioscope (Bermondsey) Company, London County Council *v.*	445
Black, Browne *v.*	975
Blue Anchor Line, Ld., Skailes *v.* (C. A.)	360
Bragg, Carlisle and Cumberland Banking Company *v.* (C. A.)	489
Brandy *v.* Raphael (Owners of S.S.) (C. A.)	376

PAGE

Brewery (Cannon) Company, London County Council *v.* 235
British and Mexican Shipping Company *v.* Lockett Brothers & Co., Ld. (C. A.) 264
British Westinghouse Electric and Manufacturing Company *v.* Underground Electric Railway Company of London 575
Brooks, Metropolitan Water Board *v.* (C. A.) 289
Bros, Rex *v.* Ex parte Hardy 159
Brougham, Ex parte. In re Darby 95
Brown, Ex parte. Rex *v.* Garrett-Pegge 880
——— *v.* Crossley 603
Browne *v.* Black 975
Burden *v.* Rigler 337
Burn, Stone *v.* 927
Burrows *v.* Thomas 43

C.

Calne Union *v.* Wilts County Council 717
Campbell *v.* Paddington Corporation 869
Canal (Manchester Ship) Company *v.* London and North Western Railway Company (C. A.) 657
Cannon Brewery Company, London County Council *v.* 235
Cardiff Corporation *v.* Hall (C. A.) 1009
Cardiff Guardians, Glamorgan County Asylum (Committee of Visitors) *v.* (C. A.) 437
Carleton Illustrators *v.* Coleman & Co., Ld. 771
Carlisle and Cumberland Banking Company *v.* Bragg (C. A.) 489
Chester Rural Council, Freeman (G.) & Sons *v.* (C. A.) 783

PAGE

Chorley Union Assessment Committee, Liverpool Corporation *v.* 1057
Clare *v.* Dobson 35
Clift, Strutt *v.* 1
Clothing and Supply (Provident) Company, Pierce *v.* (C. A.) 997
Coaker *v.* Willcocks 649
Coal (Powells Tillery Steam) Company, Hawkins *v.* (C. A.) 988
Collieries (Denaby and Cadeby Main), Ld. *v.* Anson (C. A.) 171
Collieries (New Monckton), Ld., Keeling *v.* (C. A.) 250
Colliery (Tamworth) Company, Hall *v.* (C. A.) 341
Cook *v.* Hobbs 14
—— *v.* Trevener 9
Cory & Son, Ld. *v.* France, Fenwick & Co., Ld. (C. A.) 114
Couchman, Warner *v.* (C. A.) 351
Crippen, Rex *v.* (C. C. A.) 149
Crossley, Brown *v.* 603
Crow, Holloway *v.* 636
Cundiff *v.* Fitzsimmons 513

D.

Da Costa, Genforsikrings Aktieselskabet (Skandinavia Reinsurance Company of Copenhagen) *v.* 137
Darby, In re. Ex parte Brougham 95
Davison, Whitehorn Brothers *v.* (C. A.) 463
Dawson (Mark) & Son, Ld., Taylor *v.* 145
Deacon *v.* Evans 571
Debtor (No. 20 of 1910), In re a (C. A.) 841
Deddington Steamship Company *v.* Inland Revenue Commissioners 1078
Denaby and Cadeby Main Collieries, Ld. *v.* Anson (C. A.) 171

PAGE

Deyes *v.* Wood (C. A.) 806
Director of Public Prosecutions, Whiteman *v.* 824
Dobson, Clare *v.* 35
Douglas *v.* Sanderson 166
Dunn, In re. Simmons *v.* Liberal Opinion Ld. (C. A.) 966
Durham County Council, Gillow *v.* 222
Dyson *v.* Attorney-General (C. A.) 410

E.

E. Clemens Horst Company, Biddell Brothers *v.* 214
——————————— (C. A.) 934
Electric and Manufacturing (British Westinghouse) Company *v.* Underground Electric Railway Company of London 575
Electric Railway (Underground) Company of London, British Westinghouse Electric and Manufacturing Company *v.* 575
Evans, Deacon *v.* 571
Evans (R.) & Co., Ld., Astley *v.* (C. A.) 1036
Exeter Corporation, Attorney-General *v.* 1092

F.

Fisher *v.* Great Western Railway Company (C. A.) 551
Fitzsimmons, Cundiff *v.* 513
Flint & Co. and Kedwell, In re (C. A.) 797
France, Fenwick & Co., Ld., Cory & Son, Ld. *v.* (C. A.) 114
Freeman (G.) & Sons *v.* Chester Rural Council (C. A.) 783

G.

PAGE

Gadd *v.* Thompson 304
Gardner, Ld., Prested Miners Company *v.* (C. A.) 425
Garrett-Pegge, Rex *v.* Ex parte Brown 880
Genforsikrings Aktieselskabet (Skandinavia Reinsurance Company of Copenhagen) *v.* Da Costa 137
Gillow *v.* Durham County Council 222
Glamorgan County Asylum (Committee of Visitors) *v.* Cardiff Guardians (C. A.) 437
Golds, Wandsworth Borough Council *v.* 60
Great Western Railway Company, Fisher *v.* (C. A.) 551
——, Spillers & Bakers, Ld. *v.* (C. A.) 386

H.

H. Tolputt & Co., Ld. *v.* Mole 87
——————————— *v.* ——— (C. A.) 836
Hackney Union, Kingston-upon-Hull Incorporation for the Poor *v.* (C. A.) 748
Hall, Cardiff Corporation *v.* (C. A.) 1009
——— *v.* Tamworth Colliery Company (C. A.) 341
Halliday *v.* Taffs 594
Hardy, Ex parte. Rex *v.* Bros 159
Hawkins *v.* Powells Tillery Steam Coal Company (C. A.) 988
Haylett *v.* Thompson 311
Hertfordshire Justices, Rex *v.* 612
Hobbs, Cook *v.* 14
Holland (William) & Sons, Ld., Riley *v.* (C. A.) 1029
Holloway *v.* Crow 636
Horn *v.* Lords Commissioners of the Admiralty (C. A.) 24

PAGE

Horst (E. Clemens) Company, Biddell Brothers *v.* 214

——————————————————, ——————————— (C. A.) 934

Hosegood & Sons *v.* Wilson (C. A.) 30

Hunt (William) & Sons, Ld., Ball *v.* (C. A.) 1048

I.

Inland Revenue Commissioners, Deddington Steamship Company *v.* 1078

J.

Jackson *v.* A. G. Mulliner Motor Body Company 546

Jay, Angel *v.* 666

Johannesburg (Owners of S.S.), Kitchenham *v.* (C. A.) 523

Jones *v.* Pacaya Rubber and Produce Company (C. A.) 455

K.

Kedwell and Flint & Co., In re (C. A.) 797

Keeling *v.* New Monckton Collieries, Ld. (C. A.) 250

Kinahan & Co., Ld. *v.* Parry (C. A.) 459

Kingston-upon-Hull Incorporation for the Poor *v.* Hackney Union (C. A.) 748

Kish *v.* Taylor (C. A.) 625

Kitchenham *v.* Johannesburg (Owners of S.S.) (C. A.) 523

L.

Lambert *v.* Thomas 43

Lawton, Park *v.* 588

Leach *v.* Oakley Street & Co. (C. A.) 523

Liberal Opinion Limited, Simmons *v.* In re Dunn (C. A.) 966

PAGE

Liverpool Corporation *v.* Chorley Union Assessment Committee 1057

Locke, Rex *v.* (C. A.) 680

Lockett Brothers & Co., Ld., British and Mexican Shipping Company *v.* (C. A.) 264

London and North Western Railway Company, Manchester Ship Canal Company *v.* (C. A.) 657

——————————————————— *v.* South Eastern Railway Company 534

London County Council *v.* Bermondsey Bioscope Company 445

——————————— *v.* Cannon Brewery Company 235

————————————, Rea *v.* 740

Lords Commissioners of the Admiralty, Horn *v.* (C. A.) 24

Lurcott *v.* Wakely & Wheeler (C. A.) 905

M.

McLean, Rex *r.* (C. C. A.) 332

Manchester Corporation, Rex *v.* 560

Manchester Ship Canal Company *v.* London and North Western Railway Company (C. A.) 657

Mark Dawson & Son, Ld., Taylor *v.* 145

Martin, Rogers, Eungblut & Co. *v.* (C. A.) 19

Metropolitan Water Board, Batt *v.* 845

——————————————————— *v.* Brooks (C. A.) 289

Mexican (British and) Shipping Company *v.* Lockett Brothers & Co., Ld. (C. A.) 264

PAGE

Midland Railway Company, Turner *v.* 832
Miners (Prested) Company *v.* Gardner, Ld. (C. A.) 425
Mining and Finance (United) Corporation *v.* Becher (C. A.) 840
Mole, Tolputt (H.) & Co., Ld. *v.* 87

(C. A.) 836
Monckton (New) Collieries, Ld., Keeling *v.* (C. A.) 250
Mortimer, Rex *v.* (C. C. A.) 70
Motor Body (A. G. Mulliner) Company, Jackson *v.* 546
Mulliner (A. G.) Motor Body Company, Jackson *v.* 546

N.

Nash, Pharmaceutical Society *v.* 520
New Monckton Collieries, Ld., Keeling *v.* (C. A.) 250
Newman *v.* Oughton 792

O.

Oakley Street & Co., Leach *v.* (C. A.) 523
Oughton, Newman *v.* 792

P.

Pacaya Rubber and Produce Company, Jones *v.* (C. A.) 455
Paddington Corporation, Campbell *v.* 869
Park *v.* Lawton 588
Parry, Kinahan & Co., Ld. *v.* (C. A.) 459
Pascall & Sons, Roles *v.* (C. A.) 982
Pharmaceutical Society *v.* Nash 520
Pierce *v.* Provident Clothing and Supply Company (C. A.) 997
Platt, Ranson *v.* 499
Poplar Union, Billericay Rural Council *v.* 734
Potts *v.* Sanderson 166

PAGE

Powells Tillery Steam Coal Company, Hawkins *v.* (C. A.) 988
Prested Miners Company *v.* Gardner, Ld. (C. A.) 425
Proctor & Sons *v.* Robinson (C. A.) 1004
Propert, Rex *v.* 83
Provident Clothing and Supply Company, Pierce *v.* (C. A.) 997

R.

R. Evans & Co., Ld., Astley *v.* (C. A.) 1036
Ranson *v.* Platt 499
Raphael (Owners of S.S.), Brandy *v.* (C. A.) 376
Rea *v.* London County Council 740
Remorquage à Hélice (Société Anonyme de) *v.* Bennetts 243
Retter, Walker *v.* 1103
Rex *v.* Ball (C. C. A. & H. L.) 461
— *v.* Bates (C. C. A.) 964
— *v.* Bros. Ex parte Hardy 159
— *v.* Crippen (C. C. A.) 149
— *v.* Garrett - Pegge. Ex parte Brown 880
— *v.* Hertfordshire Justices 612
— *v.* Locke (C. A.) 680
— *v.* McLean (C. C. A.) 332
— *v.* Manchester Corporation 560
— *v.* Mortimer (C. C. A.) 70
— *v.* Propert 83
— *v.* Richards (C. C. A.) 260
— *v.* Spratling (C. C. A.) 77
— *v.* Taylor (C. C. A.) 674
Richards, Rex *v.* (C. C. A.) 260
——— *v.* Starck 296
Rigler, Burden *v.* 337
Riley *v.* William Holland & Sons, Ld. (C. A.) 1029
Robinson, Proctor & Sons *v.* (C. A.) 1004
Rogers, In re (C. A.) 641
———, Ex parte Sheriff of Sussex 104

PAGE

Rogers, Eungblut & Co. *v.* Martin (C. A.) 19
Roles *v.* Pascall & Sons (C. A.) 982
Rubber and Produce (Pacaya) Company, Jones *v.* (C. A.) 455

S.

Sanderson, Douglas *v.* 166
————-, Potts *v.* 166
Saqui & Lawrence *v.* Stearns (C. A.) 426
Seldon *v.* Wilde (C. A.) 701
Shipping (British and Mexican) Company *v.* Lockett Brothers & Co., Ld. (C. A.) 264
Simmons *v.* Liberal Opinion Limited. In re Dunn (C. A.) 966
Skailes *v.* Blue Anchor Line, Ld. (C. A.) 360
Skandinavia Reinsurance Company of Copenhagen *v.* Da Costa 137
South Eastern Railway Company, London and North Western Railway Company *v.* 534
Spillers & Bakers, Ld. *v.* Great Western Railway Company (C. A.) 386
Spratling, Rex *v.* (C. C. A.) 77
Starck, Richards *v.* 296
Stead *v.* Ackroyd 57
Steamship (Deddington) Company *v.* Inland Revenue Commissioners 1078
Stearns, Saqui & Lawrence *v.* (C. A.) 426
Stone *v.* Burn 927
Strutt *v.* Clift 1
Sussex (Sheriff of), Ex parte. In re Rogers 104

T.

Taffs, Halliday *v.* 594
Talbot *v.* Von Boris (C. A.) 854

PAGE

Tamworth Colliery Company, Hall *v.* (C. A.) 341
Taylor, Kish *v.* (C. A.) 625
——— *v.* Mark Dawson & Son, Ld. 145
——— Rex *v.* (C. C. A.) 674
Thomas, Burrows *v.* 43
———-- Lambert *v.* 43
———-- Wixon *v.* 43
Thompson, Gadd *v.* 304
————-, Haylett *v.* 311
Tillery (Powells) Steam Coal Company, Hawkins *v.* (C. A.) 988
Tolputt (H.) & Co., Ld. *v.* Mole 87
————————————-- *v.* ——— (C. A.) 836
Trevener, Cook *v.* 9
Turner *v.* Midland Railway Company 832

U.

Underground Electric Railway Company of London, British Westinghouse Electric and Manufacturing Company *v.* 575
United Mining and Finance Corporation *v.* Becher (C. A.) 840
Upfill *v.* Wright 506

V.

Von Boris, Talbot *v.* (C. A.) 854

W.

Wakely & Wheeler, Lurcott *v.* (C. A.) 905
Walker *v.* Retter 1103
Wandsworth Borough Council *v.* Golds 60
Warner *v.* Couchman (C. A.) 351
Water (Metropolitan) Board, Batt *v.* 845

	PAGE
Water (Metropolitan) Board *v.* Brooks (C. A.)	289
Westinghouse (British) Electric and Manufacturing Company *v.* Underground Electric Railway Company of London	575
Whitehorn Brothers *v.* Davison (C. A.)	463
Whiteman *v.* Director of Public Prosecutions	824
Wilde, Seldon *v.* (C. A.)	701
Willcocks, Coaker *v.*	649
William Holland & Sons, Ld., Riley *v.* (C. A.)	1029
William Hunt & Sons, Ld., Ball *v.* (C. A.)	1048
Williams *v.* Baker	566
Wilson, Hosegood & Sons *v.* (C. A.)	30
——— *v.* Wilson	327
Wilts County Council, Calne Union *v.*	717
Wixon *v.* Thomas	43
Wood, Deyes *v.* (C. A.)	806
Wright, Upfill *v.*	506

TABLE OF CASES CITED.

A.

		PAGE
Agius *v.* Great Western Colliery Company	[1899] 1 Q. B. 413	38
Aldred's Case	9 Rep. 57b	871
Allchurch *v.* Hendon Union	[1891] 2 Q. B. 436	168
Allison, Johnson, & Foster, Ld., In re	[1904] 2 K. B. 327	817
Amalgamated Society of Railway Servants *v.* Osborne	[1910] A. C. 87	186
Andrew *v.* Failsworth Industrial Society	[1904] 2 K. B. 32	352, 998
Anglo-Algerian Steamship Company *v.* Houlder Line, Ld.	[1908] 1 K. B. 659	246
Anon.	1 Camp. 517	186
Anstey's Case	2 Peck. 109	168
Antoniadi *v.* Smith	[1901] 2 K. B. 589	21
Argentino, The	14 App. Cas. 519	245
Armstrong, In re	[1892] 1 Q. B. 327	707
Arnison, Ex parte	L. R. 3 Ex. 56.	1105
Artola Hermanos, In re	24 Q. B. D. 640	899
Attorney-General *v.* Ashborne Recreation Ground Company	[1903] 1 Ch. 101	776
——— *v.* De Winton	[1906] 2 Ch. 106	683
——— *v.* Doughty	2 Ves. Sen. 453	872
——— *v.* Halling	15 M. & W. 687	414
——— *v.* Horner	14 Q. B. D. 245	1096
——— *v.* Parmeter	10 Price, 378	191
——— *v.* Terry	L. R. 9 Ch. 423	186
——— *v.* West Riding County Council	[1907] A. C. 29	227
——— *v.* Wright	[1897] 2 Q. B. 318	186
Attorney-General of Duchy of Lancaster *v.* London and North Western Railway Company	[1892] 3 Ch. 274	412
Ayrshire and Wigtownshire Railway Company *v.* Glasgow and South Western Railway Company	6 Ry. & Ca. Tr. Cas. 26	539

B.

Bailey *v.* Bidwell	13 M. & W. 73	472
Baker *v.* Ambrose	[1896] 2 Q. B. 372	317
——— *v.* Moore	1 Ld. Raym. 491	876
Balian *v.* Joly Victoria & Co.	6 Times L. R. 345	631
Ball, In re	L. R. 8 C. P. 104	704
Balls *v.* Metropolitan Board of Works	L. R. 1 Q. B. 337	554

		PAGE
Bank of Ireland *v.* Evans' Charity (Trustees of)	5 H. L. C. 389	493
Bannatyne *v.* MacIver	[1906] 1 K. B. 103	687
Bannatyne & Sons *v.* Great Southern and Western Railway Company	12 Ry. & Ca. Tr. Cas. 105	540
Barker *v.* Edger	[1898] A. C. 748	1095
Barnabas *v.* Bersham Colliery Company	3 B. W. C. C. 216; 103 L. T. 513	990
Barraclough *v.* Brown	[1897] A. C. 615	413
Barret *v.* Great Northern Railway Company	1 C. B. (N.S.) 423; 26 L. J. (C.P.) 83	391
Barrow *v.* Myers & Co.	4 Times L. R. 441	939
Bartholomew *v.* Wiseman	56 J. P. 455	884
Bates *v.* Plumstead Overseers	64 L. J. (M.C.) 127	50
Baxendale *v.* Great Western Railway Company	5 C. B. (N.S.) 336	537
Beatty *v.* Gillbanks	9 Q. B. D. 308	339
Beckett *v.* Midland Railway Company	L. R. 3 C. P. 82	873
Belper School Attendance Committee *v.* Bailey	9 Q. B. D. 259	639
Bender *v.* Zent (Owners of S.S.)	[1909] 2 K. B. 41	1040
Benjamin *v.* Storr	L. R. 9 C. P. 400	874
Bennetts & Co. *v.* Brown	[1908] 1 K. B. 490	273
Berdsley *v.* Pilkington	Gouldsborough, 100	649
Bernina, The	13 App. Cas. 1	117
Betsey Caines, The	2 Hagg. Adm. 28	244
Bidder *v.* Bridges	[1887] W. N. 208	94
Biddle *v.* Bond	6 B. & S. 225	503
Birmingham Churchwardens *v.* Shaw	10 Q. B. 868	50
Bischoff's Trustee *v.* Frank	Unreported	863
Blackburn and District Benefit Building Society, In re	42 Ch. D. 343	515
Blake *v.* Beech	1 Ex. D. 320	886
Blakeley *v.* Muller	[1903] 2 K. B. 760 n.	874
Blaker *v.* Herts and Essex Waterworks Company	41 Ch. D. 399	818
Blithman, In re	L. R. 2 Eq. 23	896
Blundell *v.* Catterall	5 B. & Ald. 268	186
Blunt *v.* Heslop	8 Ad. & E. 577	977
Blyth *v.* Smith	5 Man. & G. 405	38
Board of Trade *v.* Baxter	[1907] A. C. 373	312
Bolt *v.* Stennett	8 T. R. 606	191
Bonnard *v.* Perryman	[1891] 2 Ch. 269	422
Booth *v.* Ratté	15 App. Cas. 188	186
Bootle Overseers *v.* Liverpool Warehousing Company	85 L. T. 45	1068
Borwick *v.* Southwark Corporation	[1909] 1 K. B. 78	1064
Bos *v.* Helsham	L. R. 2 Ex. 72	669
Bowes *v.* Shand	2 App. Cas. 455	218, 277
Boxall *v.* Boxall	27 Ch. D. 229	330
Boyd, In re	[1895] 1 Q. B. 611	704
Bramley *v.* Evans	3 Butterworth W. C. C. 34	984
Brandao *v.* Barnett	12 Cl. & F. 787	945
Brediman's Case	6 Rep. 56b	516
Brett *v.* Clowser	5 C. P. D. 376	669
Brice *v.* Edward Lloyd, Ld.	[1909] 2 K. B. 804	1038
British Seamless Paper Box Company, In re	17 Ch. D. 467	100
Broadbent, Ex parte	[1910] 2 K. B. 192	639

		PAGE
Brogden *v.* Metropolitan Railway Company	2 App. Cas. 666	977
Bromley *v.* Smith	[1909] 2 K. B. 235	306
Brownlie *v.* Campbell	5 App. Cas. 925	669
Bryce *v.* Ehrmann	7 F. 5	470
Brydon *v.* Stewart	2 Macq. 30	1031
Burge *v.* Brutton	2 Hare, 373	330
Burton *v.* Aston Overseers	8 C. B. 7	168

C.

Calder and Hebble Navigation Company *v.* Pilling	14 M. & W. 76	449
Calliope, The	14 P. D. 138; [1891] A. C. 11	119
Canada Southern Railway Company *v.* International Bridge Company	8 App. Cas. 723	803
Carlill *v.* Carbolic Smoke Ball Company	[1892] 2 Q. B. 484	300
Carney *v.* Plimmer	[1897] 1 Q. B. 634	300
Carr *v.* London and North Western Railway Company	L. R. 10 C. P. 307	493
—— *v.* Montefiore	33 L. J. (Q.B.) 256	429
Carritt *v.* Godson	[1899] 2 Q. B. 193	239
Carruthers *v.* Hollis	8 Ad. & E. 113	651
Carter *v.* Murcot	4 Burr. 2163	191
Casberd *v.* Attorney-General	6 Price, 411	413
Castlegate Steamship Company *v.* Dempsey	[1892] 1 Q. B. 54	278
Catmur *v.* Knatchbull	7 T. R. 448	707
Cattle *v.* Stockton Waterworks Company	L. R. 10 Q. B. 453	243
Cecil's (Sir Thomas) Case	7 Rep. 89	414
Chapman *v.* Fylde Waterworks Company	[1894] 2 Q. B. 599	846
Charing Cross, Euston and Hampstead Railway Company *v.* Boots	[1909] 2 K. B. 640	32
Charron, Ld. *v.* Indian Motor Taxi-Cab Company	Not reported	456
Child *v.* Hearn	L. R. 9 Ex. 176	649
Ching *v.* Surrey County Council	[1910] 1 K. B. 736	228
Chisholm *v.* Doulton	22 Q. B. D. 736	4
Christie, Manson & Woods *v.* Cooper	[1900] 2 Q. B. 522	930
Civil Service Co-operative Society *v.* General Steam Navigation Company	[1903] 2 K. B. 756	874
Clark *v.* Chambers	3 Q. B. D. 327	133
—— *v.* Gas Light and Coke Company	21 Times L. R. 184	1006, 1049
	7 W. C. C. 119	1009
Clements, In re	[1901] 1 K. B. 260	317
Clover, Clayton & Co., Ld. *v.* Hughes	[1910] A. C. 242	352, 990
Clow *v.* Brogden	2 Man. & G. 39	39
Coe *v.* Platt	6 Ex. 752; 7 Ex. 460	548
Colebrooke, Ex parte	7 Price, 87	413
—— *v.* Attorney-General	7 Price, 146	413
Collie, In re	8 Ch. D. 807	99
Connan, In re	20 Q. B. D. 690	321
Connolly *v.* Young's Paraffin Company	22 R. 80	984
Conquest *v.* Ebbetts	[1896] A. C. 490	38
Cook *v.* Montagu	L. R. 7 Q. B. 418	292
Coomber *v.* Berks Justices	10 Q. B. D. 267; 9 App. Cas. 61	49

		PAGE
Cooper *v.* Whittingham	15 Ch. D. 501	776
Cornwall's (Joshua) Case	2 Str. 881	429
Corsellis *v.* London County Council	[1908] 1 Ch. 13	65
Coster *v.* Headland	[1906] A. C. 286; [1905] 1 K. B. 219	1107, 1109
Coulthard *v.* Consett Iron Company	[1905] 2 K. B. 869	250
Cowler *v.* Moresby Coal Company	1 Times L. R. 575	1030
Cox *v.* Hickman	8 H. L. C. 268	810
Craske *v.* Wigan	[1909] 2 K. B. 631	353
Craufurd *v.* Attorney-General	7 Price, 1	413
Crisp *v.* Churchill	Unreported	508
Crocker *v.* Plymouth Corporation	[1906] 1 K. B. 494	229
Cross *v.* West Derby Union	16 Times L. R. 120	55
Crowther Smith *v.* New Forest Union	Ryde, Rat. App. 311	1072
Crozier, Stephens & Co. *v.* Auerbach	[1908] 2 K. B. 161	218, 936
Cundy *v.* Lindsay	3 App. Cas. 459	471
Cunningham *v.* McGregor & Co.	3 F. 775	253

D.

Dalton *v.* Angus	6 App. Cas. 740	872
Darlaston Local Board *v.* London and North Western Railway Company	[1894] 2 Q. B. 694	391
Dashwood *v.* Magniac	[1891] 3 Ch. 306	191
Davidson's Settlement Trusts, In re	L. R. 15 Eq. 383	896
Davies *v.* Seisdon Union	[1908] A. C. 315	1064
——— *v.* Solomon	L. R. 7 Q. B. 112	873
Deare *v.* Attorney-General	1 Y. & C. Ex. 197	413
De Francesco *v.* Barnum	43 Ch. D. 165	305
De Lassalle *v.* Guildford	[1901] 2 K. B. 215	668
Denaby Main Colliery Company *v.* Manchester, Sheffield and Lincolnshire Railway Company	3 Ry. & Ca. Tr. Cas. 426	391
Dewhurst *v.* Mather	[1908] 2 K. B. 754	378
Dick *v.* Badert Frères	10 Q. B. D. 387	186
Dickinson *v.* "Barmak," Ld.	124 L. T. Jo. 403	998
Dicksee *v.* Hoskins	[1901] 2 K. B. 122	239
Dickson *v.* Great Northern Railway Company	18 Q. B. D. 176	391
Dixon *v.* Blackpool and Fleetwood Tramroad Company	[1909] 1 K. B. 860	50
——— *v.* Wells	25 Q. B. D. 249	887
Dobby *v.* Wilson, Pease & Co.	2 B. W. C. C. 370	1018
Dorchester Union *v.* Poplar Union	21 Q. B. D. 88	752
Dorté *v.* South African Super-Aeration Company	20 Times L. R. 425	591
Dothie *v.* Robert Macandrew & Co.	[1908] 1 K. B. 803	363
Douglas *v.* United Mineral Mining Company	2 W. C. C. 15	998
Driver *v.* Broad	[1893] 1 Q. B. 744	1084
Dudley, In re	12 Q. B. D. 44	714
Dulaney *v.* Merry & Son	[1901] 1 K. B. 536	898
Dulieu *v.* White & Sons	[1901] 2 K. B. 669	245
Dunn *v.* Hales	1 F. & F. 174	976
Dunning, In re	54 L. J. (Ch.) 900	331

E.

		PAGE
East and West India Dock Company *v.* Shaw, Savill, and Albion Company	39 Ch. D. 524	540
East London Railway Company *v.* Whitechurch	L. R. 7 H. L. 81	1065
East London Waterworks Company *v.* St. Matthew, Bethnal Green	17 Q. B. D. 475	852
Ebbetts *v.* Conquest	[1895] 2 Ch. 377	35
Edie *v.* East India Company	1 W. Bl. 295; 2 Burr. 1216	944, 948
Edmonds *v.* Foster	45 L. J. (M.C.) 41	590
Egan *v.* Floyde	74 J. P. 223	4
Eke *v.* Hart-Dyke	[1910] 2 K. B. 677	356
Elmville (No. 2), The	[1904] P. 422	362
Emary *v.* Nolloth	[1903] 2 K. B. 264	6
Emma Silver Mining Company *v.* Grant	17 Ch. D. 122	99
Engelhart *v.* Farrant	[1897] 1 Q. B. 240	117
English & Ayling, In re	[1903] 1 K. B. 680	112
Erie County Natural Gas and Fuel Company *v.* Carroll	[1911] A. C. 105	580
Europa, The	[1908] P. 84	627
Excelsior, The	L. R. 2 A. & E. 268	186

F.

Farnham *v.* Atkins	1 Sid. 446	305
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1	447
Fitch *v.* Bermondsey Guardians	[1904] 2 K. B. 709; [1905] 1 K. B. 524	440
Fitzgerald *v.* Champneys	2 J. & H. 31	1095
Fitzhardinge *v.* Gloucester and Berkeley Canal Company	L. R. 7 Q. B. 776	555
——— *v.* Purcell	[1908] 2 Ch. 139	186
Foley's Charity Trustees *v.* Dudley Corporation	[1910] 1 K. B. 317	517
Ford, Ex parte	10 Q. B. D. 305	817
Foreman *v.* Free Fishers of Whitstable	L. R. 4 H. L. 266	186
Forget *v.* Ostigny	[1895] A. C. 318	299
Formby *v.* Barker	[1903] 2 Ch. 539	242
Forshaw *v.* Chabert	3 Brod. & B. 158	628
Forwood Brothers *v.* Great Northern Railway Company	12 Ry. & Ca. Tr. Cas. 89	538
Foster *v.* Mackinnon	L. R. 4 C. P. 704	489
——— *v.* Reeves	[1892] 2 Q. B. 255	669
Foster's Case	11 Rep. 56b	1100
Freston, In re	11 Q. B. D. 545	701
Fulham Parish *v.* Woolwich Union	[1907] A. C. 255	748

G.

Gambier *v.* Lydford Overseers	2 E. & B. 346	50
Gann *v.* Free Fishers of Whitstable	11 H. L. C. 192	186
Gardiner *v.* McFarlane	20 R. 414	278
Gaskell *v.* Gosling	[1896] 1 Q. B. 669; [1897] A. C. 575	810
George and Goldsmiths and General Burglary Insurance Association, In re	[1899] 1 Q. B. 595	429

		PAGE
Gibson *v.* Barton	L. R. 10 Q. B. 329	588
—— *v.* Small	4 H. L. C. 353	941
Gilbert, Ex parte	[1898] 1 Q. B. 282	331
Gilroy *v.* Price	[1893] A. C. 56	629
Glenfruin, The	10 P. D. 103	628
Gluckstein *v.* Barnes	[1900] A. C. 240	99
Godfrey *v.* George	[1896] 1 Q. B. 48	703
Gonty and Manchester, Sheffield and Lincolnshire Railway Company, In re	[1896] 2 Q. B. 439	555
Goodman *v.* Blake	19 Q. B. D. 77	108, 643
—— *v.* Harvey	4 Ad. & E. 870	472
Gorris *v.* Scott	L. R. 9 Ex. 125	872
Gough *v.* Crawshay Brothers, Cyfartha, Ld.	[1908] 1 K. B. 441	378
Grand Junction Waterworks Company *v.* Rodocanachi	[1904] 2 K. B. 230	847
Gray *v.* North-Eastern Railway Company	1 Q. B. D. 696	555
Great Central Railway Company *v.* Banbury Union	[1909] A. C. 78	1064
Great Western Railway Company *v.* Severn and Wye and Severn Bridge Railway Co.	5 Ry. & Ca. Tr. Cas. 170	537
Great Western Railway Company *v.* Sutton	L. R. 4 H. L. 226	540
Green *v.* Symons	13 Times L. R. 301	668
Greenland *v.* Chaplin	5 Ex. 243	122
Gregory's Case	6 Rep. 19b	1096
Greig *v.* Edinburgh University	L. R. 1 H. L. Sc. 348	49
Grey, In re	[1892] 2 Q. B. 440	703
Guibert *v.* Readshaw	2 Park, 637	628
Gutteridge *v.* Munyard	1 Moo. & R. 334; 7 C. & P. 129	908, 909
Gylbert *v.* Fletcher	Cro. Car. 179	305

H.

Hacking *v.* Lee	2 E. & E. 906	1107
Hadley *v.* Baxendale	9 Ex. 341	38
Hamlyn & Co. *v.* Wood & Co.	[1891] 2 Q. B. 488	946
Hammond *v.* Bussey	20 Q. B. D. 79	38
Hardman *v.* Booth	1 H. & C. 803	486
Hardwick, In re	12 Q. B. D. 148	703
Hardy's Crown Brewery, In re	[1910] 2 K. B. 257	423
Hare *v.* London and North-Western Railway Company	2 J. & H. 80; 30 L. J. (Ch.) 817	391
Harnett *v.* Miles	48 J. P. 455	9
Harris *v.* Cockermouth and Workington Railway Co.	3 C. B. (N.S.) 693	537
Harrison, In re	10 Mor. 106	108
Harrison & Camm *v.* Midland Railway Company	8 Ry. & Ca. Tr. Cas. 60	391
Harter *v.* Salford Overseers	6 B. & S. 591	1063
Hartley *v.* Herring	8 T. R. 130	873
Hasker *v.* Wood	54 L. J. (Q.B.) 419	1107
Havelock *v.* Geddes	10 East, 555	628
Hawkins *v.* Gathercole	6 D. M. & G. 1	1105

		PAGE
Haworth *v.* Andrew Knowles & Son, Ld.	19 Times L. R. 658	27
Hayward, In re	[1897] 1 Ch. 905	896
———	[1901] 1 Ch. 221	331
Heavan *v.* Pender	11 Q. B. D. 503	246
Hedges *v.* London and St. Katherine Dock Company	16 Q. B. D. 597	182
Hedley *v.* Pinkney & Sons' Steamship Company	[1894] A. C. 222	117
Henry Pound, Son & Hutchins, In re	42 Ch. D. 402	819
Herbage Rents, Greenwich, In re	[1896] 2 Ch. 811	517
Hewitt *v.* Duchess (Owners of S.S.)	[1910] 1 K. B. 772	524
Hichens *v.* Congreve	4 Sim. 420	99
Hindle *v.* Brown	98 L. T. 44	669
Hobbs *v.* London and South Western Railway Company	L. R. 10 Q. B. 111	245
Hobson *v.* Pattenden	[1903] 2 K. B. 760, n.	874
Hodge *v.* Attorney-General	3 Y. & C. Ex. 342	410
Hodgson *v.* West Stanley Colliery	[1910] A. C. 229	250, 343
Holman *v.* Peruvian Nitrate Company	5 R. 657	276
Holness *v.* Mackay & Davis	[1899] 2 Q. B. 319	1031
Holwell Iron Company *v.* Midland Railway Company	[1909] 1 K. B. 486; [1910] 1 K. B. 296	537
Holywell Union Assessment Committee *v.* Halkyn Drainage Company	[1895] A. C. 117	1063
Home Marine Insurance Company *v.* Smith	[1898] 1 Q. B. 829	143
Hornby *v.* Cardwell	8 Q. B. D. 329	39
Hoskins *v.* Phillips	16 L. J. (Q.B.) 339	969
Howatson *v.* Webb	[1908] 1 Ch. 1	492
Howes *v.* Bishop	[1909] 2 K. B. 390	868
Hughes *v.* Macfie	2 H. & C. 744	117
Hunter *v.* Walters	L. R. 7 Ch. 75	492
Hurley, In re	10 Mor. 120	112
Hutton *v.* Warren	1 M. & W. 466	942
Hyams *v.* Stuart King	[1908] 2 K. B. 696	137

I.

Ireland *v.* Livingston	L. R. 5 H. L. 395	217, 936
Irving *v.* Askew	L. R. 5 Q. B. 208	1107
Isherwood *v.* Whitmore	11 M. & W. 347	217
Ismay, Imrie & Co. *v.* Williamson	[1908] A. C. 437	352
Ives & Barker *v.* Willans	[1894] 2 Ch. 478	788
Iveson *v.* Moore	1 Ld. Raym. 486	876
Ivimey *v.* Ivimey	[1908] 2 K. B. 260	703

J.

Jackson *v.* Barry Railway Company	[1893] 1 Ch. 238	788
Jacobs *v.* Morris	[1901] 1 Ch. 261	727
Jefferys *v.* Dickson	L. R. 1 Ch. 183	811
Jeffries *v.* Williams	5 Ex. 792	873
Jenner *v.* Gorringe	43 J. P. 781	11
Jennings *v.* Throgmorton	Ry. & M. 251	508
Johnson *v.* Midland Railway Company	4 Ex. 367	391
Joliffe *v.* Baker	11 Q. B. D. 255	669

		PAGE
Jones *v.* Gordon	2 App. Cas. 616	469, 857
Joseph Thorley, Ld. *v.* Orchis Steamship Company	[1907] 1 K. B. 660	627
Joyner *v.* Weeks	[1891] 2 Q. B. 31	582

K.

Kate, The	[1899] P. 165	245
Keeloma Dairy Company *v.* Jones	70 J. P. 533	569
Keen *v.* Reg.	10 Q. B. 928	80
Kelly *v.* Foam Queen (Owners of S.S.)	3 W. C. C. 113	524
——— *v.* Kerry County Council	42 I. L. T. 23; 1 Butterworth's W. C. C. 94	352, 999
Kennard *v.* Ashman	10 Times L. R. 213	669
Kennedy *v.* Panama, New Zealand, and Australian Royal Mail Company	L. R. 2 Q. B. 580	673
Kingsford *v.* Merry	1 H. & N. 503	471
Kirk *v.* Reg.	L. R. 14 Eq. 558	413
Kirkham *v.* Attenborough	[1897] 1 Q. B. 201	468
Kirkwood *v.* Gadd	[1910] A. C. 422	794
Knowles *v.* Richardson	1 Mod. 55	872
Kopitoff *v.* Wilson	1 Q. B. D. 377	628
Krell *v.* Henry	[1903] 2 K. B. 740	874
Kruse *v.* Johnson	[1898] 2 Q. B. 91	448
Kutner *v.* Phillips	[1891] 2 Q. B. 267	1095
Kyffin *v.* Simmons	67 J. P. 227	242

L.

Laing *v.* Whaley	3 H. & N. 675	873
Lamb *v.* Sambas Rubber and Gutta Percha Company	[1908] 1 Ch. 845	456
Lancashire Brick and Terra Cotta Company *v.* Lancashire and Yorkshire Railway Company	[1902] 1 K. B. 651	391
Laragoity *v.* Attorney-General	2 Price, 172	413
Latchford *v.* Kelsey	96 L. T. 620	16
Lawson's Trusts, In re	[1896] 1 Ch. 175	896
Leeds and Hanley Theatres of Varieties, Ld., In re	[1902] 2 Ch. 809	99
Legge *v.* Croker	1 Ball & B. 506	666
Leicester Corporation *v.* Burgess	5 B. & Ad. 246	1096
Le Lievre *v.* Gould	[1893] 1 Q. B. 491	246
Lennox *v.* Stoddart	[1902] 2 K. B. 21	73
Levy, In re	7 Mor. 125	108
Lewis, Ex parte	21 Q. B. D. 191	339
——— *v.* Durham Union	90 L. T. 383	49
Lindsay *v.* M'Glashen & Son, Ld.	45 Sc. L. R. 559	251
Liskeard Union *v.* Liskeard Waterworks Company	7 Q. B. D. 505	239
Lister *v.* Lane	[1893] 2 Q. B. 212	905
Litchfield *v.* Dreyfus	[1906] 1 K. B. 584	794
Liverpool Corporation *v.* Llanfyllin Assessment Committee	[1899] 2 Q. B. 14	1064
Llanelly Union *v.* Neath Union	[1893] 2 Q. B. 38	753
Lloyd *v.* Johnson	1 Bos. & P. 340	508
Lloyd's Bank *v.* Cooke	[1907] 1 K. B. 794	856

		PAGE
Load *v.* Green	15 M. & W. 216	470
Logan *v.* Hall	4 C. B. 598	38
London Association of Shipowners and Brokers *v.* London and India Docks Committee	[1892] 3 Ch. 242	186
London, Chatham and Dover Railway Company *v.* South Eastern Railway Company	60 L. T. 753	93
London County Council *v.* Aylesbury Dairy Company	[1898] 1 Q. B. 106	744
London Scottish Benefit Society *v.* Chorley	13 Q. B. D. 872; 53 L. J. (Q.B.) 551; 51 L. T. 100; 32 W. R. 781; 28 Sol. J. 564	87, 93, 838
London, Tilbury and Southend Railway Company and Trustees of Gower's Walk Schools, In re	24 Q. B. D. 326	873
Loome *v.* Baily	3 E. & E. 444	11
Loomes *v.* Stotherd	1 S. & S. 458	330
Low *v.* General Steam Fishing Company	[1909] A. C. 523	533
Lowry *v.* Sheffield Coal Company	1 B. W. C. C. 1; 24 Times L. R. 142	1030
Lumsden *v.* Burnett	[1898] 2 Q. B. 177	1105
Lyon *v.* Mells	5 East, 428	629

M.

McDonald *v.* Banana (Owners of S.S.)	[1908] 2 K. B. 926	524
M'Fadyen *v.* Dalmellington	34 Sc. L. R. 266	984
Macgregor *v.* Keily	3 Ex. 794	977
McHarg *v.* Stoke-upon-Trent Assessment Committee	48 J. P. 775	51
McNeice *v.* Singer Sewing Machine Company	1911 S. C. 12	997
McNicholas *v.* Dawson & Son.	[1899] 1 Q. B. 773	1039
Main Colliery Company *v.* Davies	[1900] A. C. 358	343
Malcomson *v.* O'Dea	10 H. L. C. 593	186
Marpessa, The	[1891] P. 403	246
Marriott *v.* Thompson	Willes, 186	330
Marshall *v.* Wild Rose (Owners of S.S.)	[1910] A. C. 486	524
——— *v.* ———	[1909] 2 K. B. 46	1039
Martin *v.* Barnett	3 Butterworth W. C. C. 146	1049
——— *v.* West Derby Assessment Committee	11 Q. B. D. 145	50
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630; [1894] A. C. 535	191
May *v.* Platt	[1900] 1 Ch. 616	669
Mears *v.* Callander	[1901] 2 Ch. 388	802
Merchants of the Staple of England *v.* Bank of England	21 Q. B. D. 160	493
Mersey Docks *v.* Cameron	11 H. L. C. 443	49
Mersey Steel and Iron Company *v.* Naylor, Benzon & Co.	9 App. Cas. 434	219
Midland Railway Company *v.* Myers, Rose & Co.	[1909] A. C. 13	391

		PAGE
Miles *v.* Great Western Railway Company	[1896] 2 Q. B. 432	554
Mill *v.* Hawker	L. R. 9 Ex. 309; L. R. 10 Ex. 92	872
Millar *v.* Taylor	4 Burr. 2303	191
Minnetonka, The	[1905] P. 206	246
Mirabita *v.* Imperial Ottoman Bank	3 Ex. D. 164	956
Mitchell *v.* Glamorgan Coal Company	23 Times L. R. 588	990
Mitford and Launditch Union *v.* Wayland Union	25 Q. B. D. 164	752
Molloy *v.* South Wales Anthracite Colliery Company	4 B. W. C. C. 65	1030
Monckton *v.* Attorney-General	2 Mac. & G. 402	422
Moorcock, The	14 P. D. 64	946
Moore *v.* Lewis	[1906] 1 K. B. 27	16
——— *v.* Manchester Liners, Ld.	[1909] 1 K. B. 417; [1910] A. C. 498	523
——— *v.* Meagher	1 Taunt. 39	873
Morgan *v.* Zenaida (Owners of S.S.)	25 Times L. R. 446	352
Morris *v.* Carnarvon County Council	[1910] 1 K. B. 840	228
Moses *v.* Macferlan	2 Burr. 1005	727
Moss *v.* Great Eastern Railway Company	[1909] 2 K. B. 274	27
—— *v.* Sweet	16 Q. B. 493	472
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	538

N.

Neale *v.* Wyllie	3 B. & C. 533	42
Neilsen *v.* Wait	16 Q. B. D. 67	273
Nelson *v.* Belfast Corporation	42 I. L. T. 223; 1 B. W. C. C. 158	1030
Nelson & Sons, Ld. *v.* Nelson Line, Ld.	[1907] 2 K. B. 705	273
Niemann *v.* Moss	29 L. J. (Q.B.) 206	278
Norden Steamship Company *v.* Dempsey	1 C. P. D. 654	277
Northumberland (Duke) *v.* Attorney-General	[1905] A. C. 406	1084
Norton *v.* Gregory	73 L. T. 10	703
Norwood Overseers *v.* Salter	[1892] 2 Q. B. 118	85

O.

Oakley *v.* Boulton	5 Times L. R. 60	472
Oldershaw *v.* Holt	12 Ad. & E. 590	581
Oppenheimer *v.* Attenborough	[1907] 1 K. B. 510; [1908] 1 K. B. 221	472
——— *v.* Frazer & Wyatt	[1907] 2 K. B. 50	470
Original Hartlepool Collieries Company *v.* Gibb	5 Ch. D. 713	186
Osmond *v.* Campbell & Harrison, Ld.	[1905] 2 K. B. 852	341
Owen & Co. *v.* Cronk	[1895] 1 Q. B. 265	811

P.

Packman's Case	6 Rep. 18b	330
Pain, Ex parte	5 B. & C. 251	892

		PAGE
Parker *v.* Patrick	5 T. R. 175	468
—— *v.* Schuller	17 Times L. R. 299	939
Parkinson *v.* Great Western Railway Company	L. R. 6 C. P. 554	540
Pawlett *v.* Attorney-General	Hardres' Rep. 465	412
Payne *v.* Wilson	[1895] 1 Q. B. 653; [1895] 2 Q. B. 537	472
Pearce *v.* Brooks	L. R. 1 Ex. 213	507
Pearks, Gunston & Tee *v.* Richardson	[1902] 1 K. B. 91	883
Pearson *v.* Belgian Mills Company	[1896] 1 Q. B. 244	146
—— *v.* Holborn Union Assessment Committee	[1893] 1 Q. B. 389	49
Penley *v.* Watts	7 M. & W. 601	38
Penn *v.* Spiers & Pond, Ld.	[1908] 1 K. B. 766	363, 379
Percy Edwards, Ld. *v.* Vaughan	26 Times L. R. 349	471
Perth General Station Committee *v.* Ross	[1897] A. C. 479	391
Pertwee *v.* Townsend	[1896] 2 Q. B. 129	514
Peto *v.* Attorney-General	1 Y. & J. 509	413
Pharmaceutical Society *v.* London and Provincial Supply Association	5 App. Cas. 857	522
—— *v.* Wheeldon	24 Q. B. D. 683	521
Phillips *v.* Eyre	L. R. 6 Q. B. 1	850
Pickering Phipps *v.* London and North Western Railway Company	[1892] 2 Q. B. 229	391
Polenghi *v.* Dried Milk Company	10 Com. Cas. 42	218, 937
Pope *v.* Hill's Plymouth Company	3 Butterworth W. C. C. 339	1038
Postlethwaite *v.* Freeland	5 App. Cas. 599	278
Poulton *v.* London and South Western Railway Company	L. R. 2 Q. B. 534	872
Proctor *v.* Annison	7 C. B. (N.S.) 48	169
Proctor & Sons *v.* Robinson	[1911] 1 K. B. 1004; 3 B. W. C. C. 41	1009, 1012
Proudfoot *v.* Hart	25 Q. B. D. 42	907
Prudential Assurance Company *v.* Knott	L. R. 10 Ch. 142	422

Q.

Quebec Marine Insurance Company *v.* Commercial Bank of Canada	L. R. 3 P. C. 234	628
Queen *v.* Clarke	[1906] 2 I. R. 135	259

R.

Radcliffe *v.* Bartholomew	[1892] 1 Q. B. 161	977
—— *v.* Pacific Steam Navigation Company	[1910] 1 K. B. 685	1012
Ramsey *v.* Margrett	[1894] 2 Q. B. 18	21
Ransome *v.* Eastern Counties Railway Company	1 C. B. (N.S.) 437; 26 L. J. (C.P.) 91	391
Raphael *v.* Bank of England	17 C. B. 161	856
Rayner *v.* Drewitt	82 L. T. 718	49
Reed *v.* Great Western Railway Company	[1909] A. C. 31	1038
Reeve *v.* Attorney-General	2 Atk. 223	413
—— *v.* Gibson	[1891] 1 Q. B. 652	1107
Reney *v.* Kirkcudbright Magistrates	[1892] A. C. 264	119

		PAGE
Reg. *v.* Barclay	8 Q. B. D. 306, 486	85
—— *v.* Bird	62 J. P. 760	618
—— *v.* Breton	8 E. & B. 375	49
—— *v.* Bruce	[1892] 2 Q. B. 136	440
—— *v.* Cockshott	[1898] 1 Q. B. 582	616
—— *v.* Cotham	[1898] 1 Q. B. 802	562
—— *v.* Davies	[1897] 2 Q. B. 199	73
—— *v.* Elvet	2 E. & E. 266	768
—— *v.* Foster	8 E. & B. 380	49
—— *v.* Frost	4 St. Tr. (N.S.), col. 386	153
—— *v.* Fuidge	L. & C. 390; 33 L. J. (M.C.) 74	965
—— *v.* Graham and Burns	16 Cox, C. C. 420	339
—— *v.* Haines	2 Car. & K. 368	134
—— *v.* Hall	[1891] 1 Q. B. 747	616
—— *v.* Hannam	34 W. R. 355	49
—— *v.* Hughes	4 Q. B. D. 614	883
—— *v.* Katz	64 J. P. 807	160
—— *v.* Keyn	2 Ex. D. 63	177
—— *v.* Lewisham Union	[1897] 1 Q. B. 498	561
—— *v.* London Justices	[1892] 1 Q. B. 664	615
—— *v.* Murphy	L. R. 2 P. C. 535	153
—— *v.* Newton	48 L. J. (M. C.) 77	590
—— *v.* O'Neill	3 Craw. & Dix. 146	154
—— *v.* Postmaster-General	1 Q. B. D. 658; 3 Q. B. D. 428	363
—— *v.* Prosser	11 Beav. 306	413
—— *v.* Reed	5 Q. B. D. 483	683
—— *v.* St. Mary, Islington	L. R. 5 Q. B. 445	752
—— *v.* St. Pancras Assessment Committee	2 Q. B. D. 581	1064
—— *v.* Sansome	19 L. J. (M.C.) 143	618
—— *v.* Shaw	34 L. J. (M.C.) 169	885
—— *v.* Sheerness Urban Council	62 J. P. 563	448
—— *v.* Simpson	24 L. J. (M.C.) 7	677
—— *v.* Stainsby	8 E. & B. 370	49
—— *v.* Stewart	8 E. & B. 360	49
—— *v.* West Riding County Council	[1896] 2 Q. B. 386	447
—— *v.* White	2 Cox, C. C. 192	154
Reigate Union *v.* Croydon Union	14 App. Cas. 465	751
Rex *v.* Bartholomew	[1908] 1 K. B. 554	872
—— *v.* Beesby	[1909] 1 K. B. 849	616
—— *v.* Bleasby Inhabitants	3 B. & Al. 377	751
—— *v.* Board of Education	[1910] 2 K. B. 165	423
—— *v.* Coslet	1 Leach, 236	677
—— *v.* Gill	100 L. T. 858	607
—— *v.* Greig	4 Cr. App. Cas. 151	334
—— *v.* Higson	5 Cr. App. Cas. 167	334
—— *v.* Hilditch	5 C. & P. 299	153
—— *v.* Jordan	7 C. & P. 432	429
—— *v.* Lapier	1 Leach, 320	677
—— *v.* London Corporation	4 T. R. 21	1064
—— *v.* Melladew	[1907] 1 K. B. 192	1064
—— *v.* Munday	2 Leach, C. C. 850	260
—— *v.* Price	6 East, 323	618
—— *v.* Russell	6 B. & C. 566	171
—— *v.* St. Luke's Hospital	2 Burr. 1053	1065
—— *v.* Steventon	2 East, 362	886
—— *v.* Stimpson	2 C. & P. 415	153
—— *v.* Stone	1 East, 639	885
—— *v.* Syres	1 Cr. App. Rep. 172	334

		PAGE
Rex *v.* Tabrum	97 L. T. 551	885
—— *v.* Taylor	2 Cr. App. Rep. 158	334
—— *v.* Thompson	1 Moo. C. C. 78	677
—— *v.* Trecothick	2 Ad. & E. 405	53
—— *v.* Turner	[1910] 1 K. B. 346	977
—— *v.* Waller	[1910] 1 K. B. 364	965
—— *v.* Walsh	1 Moo. C. C. 14	677
—— *v.* Ward	4 Ad. & E. 384	188
—— *v.* Whitehorne (Judge)	[1904] 1 K. B. 827	670
—— *v.* Wilmington Inhabitants	5 B. & Al. 525	751
—— *v.* Yorkshire (West Riding) Justices	[1910] 1 K. B. 439	607
—— *v.* ————	[1910] 2 K. B. 192	639
Rhoades, In re	[1899] 2 Q. B. 347	331
Richards, Ex parte	68 J. P. 536	448
————, In re	[1901] 2 Ch. 399	330
Rigby *v.* Hewitt	5 Ex. 240	122
Riley *v.* Horne	5 Bing. 217	392
Ripley *v.* Paper Bottle Company	57 L. J. (Ch.) 327	455
Rishton Local Board *v.* Lancashire and Yorkshire Railway Company	8 Ry. & Ca. Tr. Cas. 74	537
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	119
Robert W. Blackwell & Co., Ld. *v.* Derby Borough	Supplement to Hudson on Building Contracts, 3rd ed., p. 23	788
Robertson *v.* Bristol Corporation	[1900] 2 Q. B. 198	64
———— *v.* French	4 East, 130	429
Robinson Printing Company *v.* Chic, Ld.	[1905] 2 Ch. 123	807
Robson *v.* Biggar	[1907] 1 K. B. 690	1106
Rodgers *v.* Richards	[1892] 1 Q. B. 555	884
Rooke *v.* Kensington (Lord)	2 K. & J. 753	417
Rosenqvist *v.* Bowring & Co., Ld.	[1908] 2 K. B. 108	363
Rossi *v.* Edinburgh Corporation	[1905] A. C. 21	447
Rourke *v.* Short	5 E. & B. 904	301
Rownson, In re	29 Ch. D. 358	330
Rutherglen Parish Council *v.* Glasgow Parish Council	[1902] A. C. 360	753
Rylands *v.* Fletcher	L. R. 3 H. L. 330	249
Ryves *v.* Wellington (Duke)	9 Beav. 579	422

S.

Sadler *v.* Whiteman	[1910] 1 K. B. 868; [1910] A. C. 514	825
Saffery *v.* Mayer	[1901] 1 K. B. 11	300
St. Andrew's, Holborn, and St. Clement Danes (The Case of)	2 Salk. 606	619
St. Giles, Camberwell *v.* Hunt	56 L. J. (M.C.) 65	63
St. Pancras Guardians *v.* Norwich Guardians	18 Q. B. D. 521	752
Salomon *v.* Salomon & Co.	[1897] A. C. 22	99
Salton *v.* New Beeston Cycle Company	[1900] 1 Ch. 43	969
Sanders *v.* Maclean	11 Q. B. D. 327	944
Sapsford *v.* Fletcher	4 T. R. 511	32

		PAGE
Satterthwaite, In re	2 Manson's Bkcy. Cases, 52	21
Saxby *v.* Fulton	[1909] 2 K. B. 208	301
Saxon Ship Company *v.* Union Steamship Company	5 Com. Cas. 381	273
Scarlett *v.* Hanson	12 Q. B. D. 213	644
Schloss *v.* Heriot	14 C. B. (N.S.) 59	628
Scott *v.* Denton	[1907] 1 K. B. 456	1107
Searle *v.* Matthews	19 Q. B. D. 77, n.	643
Seddon *v.* North Eastern Salt Company	[1905] 1 Ch. 326	669
Serjeant *v.* Dale	2 Q. B. D. 558	89
Seward *v.* "Vera Cruz"	10 App. Cas. 59	1095, 1107
Shackleton, Ex parte	[1910] 1 K. B. 439	607
Sharp *v.* Powell	L. R. 7 C. P. 253	133
——— *v.* Wakefield	[1891] A. C. 173	185
Sheerin *v.* Clayton & Co.	[1910] 2 I. R. 105	352
Sheffield Waterworks Company *v.* Sheffield Corporation	55 L. J. (M.C.) 40	53
Shelbury *v.* Scotsford	Yelv. 22	503
Shenstone & Co. *v.* Freeman	[1910] 2 K. B. 84	19
Showers *v.* Chelmsford Union Assessment Committee	[1891] 1 Q. B. 339	51
Simmons *v.* Edwards	16 M. & W. 838	21
——— *v.* Heath Laundry Company	[1910] 1 K. B. 543	378
Simpson *v.* Thomson	3 App. Cas. 279	246
Singleton *v.* Williamson	5 L. T. (N.S.) 644	651
Skailes *v.* Blue Anchor Line	[1911] 1 K. B. 360	382
Skilbeck *v.* Garbett	7 Q. B. 846	977
Smith *v.* Callander	[1901] A. C. 297	802
——— *v.* Darlow	26 Ch. D. 605	108
——— *v.* Southampton Corporation	[1902] 2 K. B. 244	687
——— *v.* White	L. R. 1 Eq. 626	508
——— *v.* Wilson	3 B. & Ad. 728	276
Smith's Estate, In re	35 Ch. D. 589	1096
Sneddon *v.* Robert Addie & Sons' Collieries	6 F. 992	253
Society of Practical Knowledge *v.* Abbott	2 Beav. 559	100
Soper *v.* Arnold	37 Ch. D. 96	669
South Eastern Railway Company *v.* Railway Commissioners	6 Q. B. D. 586	391
Soward *v.* Leggatt	7 C. & P. 613	910
Speyer Brothers *v.* Inland Revenue Commissioners	[1908] A. C. 92	1086
Stacey *v.* Gas Light and Coke Company	Not reported	849
Stahlschmidt *v.* Lett	1 Sm. & G. 415	330
Stanland *v.* North Eastern Steel Company	[1907] 2 K. B. 425, n.	253
Stanley's Case	Dyer, 296	616
Stanton *v.* Richardson	L. R. 7 C. P. 421; L. R. 9 C. P. 390	629
Startup *v.* Macdonald	6 Man. & G. 593	217, 949
Staunton *v.* Powell	15 W. R. 362	1064
Steel *v.* State Line Steamship Company	3 App. Cas. 72	628
Stern *v.* Tegner	[1898] 1 Q. B. 37	107, 644
Stevenson *v.* Newnham	13 C. B. 285	468
Stewart *v.* Wilsons and Clyde Coal Company	5 F. 120	356
Stirling *v.* Silburn & Pyman	[1910] 1 K. B. 67	825

		PAGE
Strachan *v.* Universal Stock Exchange	[1895] 2 Q. B. 329; [1896] A. C. 166	301
——— *v.* ——— (No. 2)	[1895] 2 Q. B. 697	300
Strang, Steel & Co. *v.* A. Scott & Co.	14 App. Cas. 601	625
Suffolk Asylum *v.* Nottingham Union	69 J. P. 120	440
Suffolk County Lunatic Asylum *v.* Stow Union	76 L. T. 494	437
Swan, Ex parte	7 C. B. (N.S.) 400	493
——— *v.* North British Australasian Company	7 H. & N. 603; 2 H. & C. 175	490
Swift *v.* Kelly	24 L. R. Ir. 478	515
Symes, Ex parte	103 L. T. 428	607

T.

Talargoch Mining Company *v.* St. Asaph Union	L. R. 3 Q. B. 478	1064
Tanner *v.* Dyball	70 J. P. 279	569
Tatam *v.* Haslar	23 Q. B. D. 345	469, 856
——— *v.* Reeve	[1893] 1 Q. B. 44	300
Tatham, Bromage & Co. *v.* Burr	[1898] A. C. 382	434
Taylor *v.* Hampstead Colliery Company	[1904] 1 K. B. 838	27
Thacker *v.* Hardy	4 Q. B. D. 685.	296
Thiis *v.* Byers	1 Q. B. D. 244.	284
Thomas *v.* Sylvester	L. R. 8 Q. B. 368	514
Thorogood *v.* Bryan	8 C. B. 115	134
Thoroughgood's Case	2 Rep. 9a	492
Thorpe *v.* Adams	L. R. 6 C. P. 125	1095
Thwaites *v.* McEvilly	[1904] 1 I. R. 310	930
Toronto Municipal Corporation *v.* Virgo	[1896] A. C. 88	448
Torrens *v.* Walker	[1906] 2 Ch. 166	905
Tregelles *v.* Sewell	7 H. & N. 574.	960
Trehearne, In re	7 Morrell, 261.	322
Truman *v.* Attenborough	26 Times L. R. 601	470
Turners *v.* Whitefield	6 F. 822	251

U.

Union Credit Bank *v.* Mersey Docks and Harbour Board	[1899] 2 Q. B. 205	493
Universal Stock Exchange *v.* Strachan	[1896] A. C. 166	73

V.

Vernon *v.* Cooke	49 L. J. (Q.B.) 767	320
Victorian Railways Commissioners *v.* Coultas	13 App. Cas. 222	245
Vimbos, Ld., In re	[1900] 1 Ch. 470	807

W.

Walker *v.* Hatton	10 M. & W. 249	38
Wallis, In re	[1902] 1 K. B. 719	899
Walter *v.* Everard	[1891] 2 Q. B. 369	305

		PAGE
Warner *v.* Couchman	[1911] 1 K. B. 351	997
Warrington *v.* Furbor	8 East, 242	1085
Watson *v.* Russell	3 B. & S. 34; 5 B. & S. 968	861
Watteau *v.* Fenwick	[1893] 1 Q. B. 346	460
Waud, Ex parte	[1898] 2 Q. B. 383	301
Weatheritt *v.* Cantlay	[1901] 2 K. B. 285	242
Webb *v.* Aston	5 Man. & G. 14	169
Weiner *v.* Gill	[1906] 2 K. B. 574	468
Weir *v.* Aberdeen	2 B. & Al. 320	628
Weir Hospital, In re	[1910] 2 Ch. 124	423
Wellesley *v.* Beaufort (Duke)	2 Russ & My. 639	706
West Ham Union *v.* Bethnal Green Churchwardens	[1894] A. C. 230	768
——— *v.* Holbeach Union	[1905] A. C. 450	748
Westminster Corporation *v.* Army and Navy Co-operative Supply	[1902] 2 K. B. 125	50
White *v.* Garden	10 C. B. 919	468
Whiteman *v.* Sadler	26 Times L. R. 655	320
Whittington *v.* Seale-Hayne	82 L. T. 49	670
Wilde, In re	[1910] 1 Ch. 100	702
——— *v.* Gibson	1 H. L. C. 605	668
Wilkinson's Case	Hale, P. C. 508	677
Willesford *v.* Watson	L. R. 8 Ch. 473	789
William Kennedy, Ld. *v.* Barrow-in-Furness Borough	Supplement to Hudson on Building Contracts, 3rd ed., p. 15	789
Williams *v.* Ocean Coal Company	[1907] 2 K. B. 422	250
——— *v.* Wigan Coal and Iron Company	3 Butterworth W. C. C. 65	1038
——— *v.* Williams	L. R. 9 C. P. 659	41
Willmott *v.* Paton	[1902] 1 K. B. 237	548
Wilson *v.* Anderton	1 B. & Ad. 450	504
——— *v.* Ocean Coal Company	21 Times L. R. 621	27
Wing *v.* Epsom Urban Council	[1904] 1 K. B. 798	886
Winstanley *v.* North Manchester Overseers	[1910] A. C. 7	1058
Withers *v.* Reynolds	2 B. & Ad. 882	219
Wood *v.* Burgess	24 Q. B. D. 162	929
Woodall, In re	13 Q. B. D. 479	317
Worcestershire County Council *v.* Worcester Union	[1897] 1 Q. B. 480	49
World's Tea Company *v.* Gardner	59 J. P. 358	569
Wrexham, Mold, and Connah's Quay Railway Company, In re	[1899] 1 Ch. 440	687
Wright *v.* Lawson	19 Times L. R. 203, 510; [1903] W. N. 108	907
——— *v.* Willcox	9 C. B. 650	154

Y.

Yonge *v.* Toynbee	[1910] 1 K. B. 215	968

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

STRUTT *v.* CLIFT.

1910
Oct. 14.

Revenue—Carriage—Licence—Vehicle "used solely for the conveyance of goods or burden"—Exemption—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict. c.* 8), *s.* 4, *sub-s.* 3.

By s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, a vehicle which, being constructed for that purpose, "is used solely for the conveyance of any goods or burden in the course of trade or husbandry" is exempted from the requirement of a carriage licence.

The appellants were the owners of a dairy farm which they placed in the charge of a bailiff. They had at the farm a milk van specially constructed for the conveyance of their milk churns from the farm to the railway station. For this van they held no carriage licence. On one occasion the bailiff without the knowledge or authority of the appellants used the van for the purpose of driving to a town some miles distant and bringing back his wife and some friends who had been to a place of amusement there. The appellants were charged with keeping the van without a licence:—

Held that, as they had placed the bailiff in charge of the farm

1910

STRUTT v. CLIFT.

generally, they were responsible for his act in using the van for the purpose for which he did, and that they consequently failed to bring themselves within the exemption and were liable to be convicted.

CASE stated by the Essex quarter sessions.

The appellants Edward Gerald Strutt and Charles Alfred Parker were convicted by justices for the petty sessional division of Tendring, in the county of Essex, of having on September 25, 1909, kept a carriage without a licence contrary to the provisions of s. 27 of 32 & 33 Vict. c. 14. The appellants appealed to the quarter sessions, who affirmed the conviction subject to the following case for the opinion of the High Court.

Upon the hearing of the appeal the following facts were proved or admitted:—

The appellants were dairy farmers residing near Witham, Essex, and were the owners and occupiers of a farm known as Landermere Hall, Thorpe-le-Soken, which is about thirty miles from Witham. The said farm was worked by a bailiff named Edwards, who resided upon the farm and was under the orders, direction, and supervision of one Everard, who resided at Terling (about thirty-five miles from the said farm) and who was the agent and steward of the appellants.

Part of the business of the farm consisted in the conveyance of milk from the farm to the railway station at Thorpe, about two miles distant therefrom, and for the purpose of conveying the milk a four-wheeled horse van was provided by the appellants, which was usually driven to and from the station by a milkman in the employ of the appellants. The said van had painted on its off side, in letters of the statutory size, the words "Strutt and Parker, Landermere Hall, Thorpe, Essex," and was constructed or adapted for use for the conveyance of milk churns in the course of the appellants' business as dairy farmers.

On the afternoon of September 24 the said Edwards, and not the milkman, drove the van taking the milk in churns to Thorpe station, and then, having delivered the milk at about 6.30 P.M., instead of returning to the farm as he ought to have done, drove the van (it being after ordinary working hours) for his own purposes, and without the knowledge or authority of the appellants or either of them, or of the said Everard, on to Clacton-on-Sea,

a distance of five-and-a-half miles from Thorpe station, where he put up the horse and van and went with his wife, whom he met there, to a place of amusement. After being in Clacton some four or five hours he started to return to the farm, being then accompanied in the van by his wife and her sister and the daughter of one of the horsemen working on the farm.

At about 12.30 A.M. on September 25, while so driving from Clacton to the farm, Edwards was stopped by a police constable, who said to him "Have you a licence?" to which he replied "No." The constable then said "You have no right to use the van in the way you are doing," and Edwards answered "I did not know I was doing wrong."

Everard admitted in evidence that he had never cautioned Edwards against such a use of the van, but no evidence was given that Edwards had on any previous or other occasion, either with or without the knowledge or authority of the appellants or of Everard, used the van in such a way as aforesaid, or that it was used on the occasion in question with the knowledge or consent or authority of the appellants or their agent Everard. The justices held that evidence as to previous user (if any) was inadmissible.

It was contended for the appellants that under the circumstances above stated they were not liable to be convicted of the offence charged, the act complained of not having been done by them or with their knowledge or authority, and that they had been guilty of no neglect or default in the matter, having no reason to anticipate that the van would be improperly used, and that they had not kept the van for any purpose other than their dairy business or in such a way as to require a licence to be taken out therefor.

The justices were of opinion that the van on the day and in the circumstances aforesaid was not used solely for the conveyance of any goods or burden in the course of trade or husbandry, and that therefore the van was a carriage for which a licence was required. They were further of opinion that, although the van was used otherwise than for the conveyance of any goods or burden in the course of trade or husbandry without the actual or constructive knowledge, consent, or authority of the

1910

STRUTT v. CLIFT.

appellants or of the said Everard, the van was kept by the appellants, and the appellants were the persons who had committed the offence of keeping the van without having taken out the licence required. They accordingly dismissed the appeal.

C. E. Jones, for the appellants. The milk van was "used solely for the conveyance of goods or burden in the course of trade" within the meaning of the exemption in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The word "used" must mean "used by the owner or with his knowledge or authority." The appellants ought not to be held responsible for the unauthorized act of a third person even though that third person was their servant. This is a general principle of the criminal law. And though the Legislature may enact that a master shall in certain circumstances be criminally responsible for his servant's act, it lies upon those who assert that it has done so to make it out convincingly from the language of the statute: *Chisholm* v. *Doulton*. (1) There is nothing in the Act of 1888 to suggest any intention to impose such a liability upon the person keeping a carriage.

[LORD ALVERSTONE C.J. Does it not make a difference that here Edwards was placed by the appellants in charge of the farm generally?]

No. The user by Edwards for his own purposes cannot be treated as a user within the meaning of the section. The case of *Egan* v. *Floyde* (2) is indistinguishable from the present. There the respondent was summoned for keeping a dog without a licence. It appeared that on one occasion whilst the respondent, a farmer, was engaged in cutting corn with a reaping machine on his farm, his dog was in the field chasing and catching rabbits that ran out of the corn as it was cut, and third persons in the presence of the respondent and with his knowledge urged the dog on to catch the rabbits, but he did not urge the dog on himself. The Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 22, provided that "In the case of dogs kept and used solely for the purpose

(1) (1889) 22 Q. B. D. 736. (2) (1910) 74 J. P. 223.

of tending sheep or cattle on a farm" the owner may obtain exemption from duty upon signing a declaration that the dog is "kept by him solely for use in tending sheep or cattle." The respondent had obtained a certificate of exemption for the dog, but it was contended that he had not used the dog solely for tending sheep or cattle and that the certificate consequently failed to protect him. Lord Alverstone C.J. there held that the statute meant that the man must bona fide use the dog solely for the purpose of tending sheep or cattle as well as keep it for that purpose, but he held that the justices were not bound to find that he had not in fact so used it. The Court refused to hold that the urging of the dog by third persons to catch the rabbits amounted to a user by the respondent of the dog for that purpose. That is a stronger case than the present, for there the acts of the third persons were done in the respondent's presence and with his knowledge. Yet it was held that mere non-interference by him was not enough to make their acts of user his.

Harvey Murphy, for the respondent. When once it is shewn that an unlicensed carriage was kept by the person charged, and that it was in fact used by some one else for a purpose not allowed by the conditions of the exemption, the person charged must be held liable. He is bound absolutely and at all events to see that the carriage is not used for such a purpose. Here the appellants had never even taken the precaution of warning Edwards not to use the van for such a purpose.

Jones in reply.

LORD ALVERSTONE C.J. We cannot interfere with this conviction. No doubt as a general rule the existence of a mens rea in the defendant is a necessary ingredient in a criminal offence, and a statute creating an offence cannot be regarded as making an exception to that rule unless it expressly or by necessary implication from its language declares its intention to do so. In this case it is contended for the appellants that the statute with which we have to deal does not form an exception to the general rule, and that before they can be convicted of keeping the van without a licence they must be shewn to have

1910

STRUTT v. CLIFT.

Lord Alverstone C.J.

had a guilty knowledge of its being used for an unexempted purpose. The facts were as follows. Messrs. Strutt & Parker were the owners of a farm at a considerable distance from the place where they resided. The farm was worked for them by a bailiff named Edwards, who acted under the directions and supervision of a steward named Everard. Amongst other things placed in Edwards' charge for the purpose of use on the farm was a milk van, upon which the appellants' names were duly painted. One evening after ordinary work hours Edwards, without the authority of the appellants, took the van to Clacton to bring back his wife and two other women who had been there to a place of amusement. The question is whether under those circumstances the appellants can be convicted of keeping the van without a licence. It is clear that they kept the van in fact, and their names were on it, and it is only the keeper of the vehicle whose name is required to be painted on it as a condition of exemption. But it is said that they were entitled to exemption in respect of it as having been "constructed . . . . for use and . . . . used solely for the conveyance of . . . . goods or burden in the course of trade or husbandry." It has been decided that that word "solely" is to be read with both antecedents, and to apply to the construction as well as the use. Here it is not disputed that the van was constructed for use solely for the conveyance of goods. But the question is whether it was solely so used. We know that in fact it was not solely so used, it having on one occasion during the taxable period been in fact used for another purpose. Therefore prima facie the appellants do not bring themselves within the exemption. But it is contended that if the user on that occasion was without their knowledge or authority the fact of that improper user will not deprive them of the benefit of the exemption to which they would otherwise be entitled. In my opinion the answer to that is that the appellants had placed Edwards, the person guilty of the improper user, in charge of the farm and the van. In the case of *Emary* v. *Nolloth* (1), where I was dealing with the question of the penal liability of a publican for the unauthorized act of his barman, I said: "Then comes the class of case in which the

(1) [1903] 2 K. B. 264.

licensee is charged with knowingly allowing, permitting, or suffering an offence to be committed; in those cases knowledge is essential; but it has been held, and this is the second principle to be extracted from the decisions, that if the licensee delegated his authority to some one else, delegating as my brother Channell said 'his own power to prevent,' and the person left in charge commits the offence, the licensee is responsible for permitting it." In the present case I think that the appellants by placing Edwards in charge of the van delegated to him their power to prevent its user for the purpose for which it was in fact used, and that they are consequently responsible for his act. We were pressed by Mr. Jones with the case of *Egan* v. *Floyde*. (1) But I distinguish that case upon the ground that there the third persons who urged the dog on to catch the rabbits did not stand in the position of the bailiff here; they had not been placed in charge of the dog, and the owner had not delegated to them his power to prevent its being used for an improper purpose.

PICKFORD J. I agree, though I cannot say that I have been free from doubt in the matter. It is clear that the appellants kept the van, and if they did they must have a licence unless they can bring it within the exemption as a "vehicle which is constructed . . . . for use and is used solely for the conveyance of any goods or burden in the course of trade or husbandry." It is not in dispute that it was constructed for use for that purpose, and that it was generally so used. But on the occasion in question the appellants' bailiff, who had the management of the farm at which the van was kept, used it without the appellants' knowledge or authority for a purpose other than that of the conveyance of burden in the course of trade. In those circumstances I think the appellants did not bring the van within the exemption. Mr. Jones contends that we ought to read into the section after the word "used" the words "by or with the authority of the person keeping the same." I do not think that we can go so far as that. For if we did we should have to include in the exempted class a vehicle which was habitually used for an

(1) 74 J. P. 223.

1910

STRUTT v. CLIFT.

improper purpose provided the owner knew nothing about it. With regard to the case of *Egan* v. *Floyde* (1) it is enough to say that it was decided under a different Act.

LORD COLERIDGE J. It is clear that the appellants kept the van. They placed it in the charge of their bailiff. Whilst it was so in his charge it was in fact used by him for a purpose other than the conveyance of goods or burden in the course of trade or husbandry. Under those circumstances the appellants cannot, in my opinion, claim exemption from carriage duty. This is not like the case of a stranger taking the van out of the appellants' possession and using it for an improper purpose. The person who so used it here was the person who had charge of it on the appellants' behalf, and their knowledge of the user was consequently unnecessary.

Appeal dismissed.

Solicitors for appellants: *Beaumont, Son & Rigden, for Beaumont & Bright, Maldon.*

Solicitors for respondent: *Jones & Son, Colchester.*

(1) 74 J. P. 223.

J. F. C.

COOK *v.* TREVENER.

1910
Oct. 14.

Game—Licence to deal in—Sale of live Pheasants bred on Pheasant Farm—Whether Licence necessary—Game Act, 1831 (1 & 2 *Will.* 4, *c.* 32), *ss.* 4, 27.

Pheasants are not the less "game" within the meaning of s. 27 of the Game Act, 1831, because they are live tame birds which have been reared in confinement under barndoor hens and have never at any time been at liberty.

Harnett v. *Miles*, (1884) 48 J. P. 455, followed.

Case stated by justices of Buckinghamshire.

An information was laid against the appellant Alfred Cook under s. 27 (1) of the Game Act, 1831, charging that he between the 20th and 25th days of December, 1909, not being a person licensed to deal in game, did unlawfully buy twenty-five live hen pheasants from one Thomas Williams, who was not a person licensed to deal in game.

Upon the hearing of the information the following facts were admitted or proved.

The appellant purchased twenty-five live hen pheasants from Williams as charged, and neither he nor Williams was licensed to deal in game. Williams was an innkeeper and a game farmer in a small way and had reared the pheasants in question, and they were tame birds. By reason of the cessation of his tenancy he was obliged to sell off his stock. The appellant was a pheasant breeder and game farmer carrying on such business on an extensive scale, and he bought the pheasants in question for the purpose of obtaining eggs in furtherance of his business. The business of pheasant breeding and game farming is an important and extensive industry in the district. The

(1) By the Game Act, 1831, s. 4, "If any person licensed to deal in game by virtue of this Act as hereinafter mentioned shall buy or sell or knowingly have in his . . . . possession or control any bird of game after the expiration of ten days . . . . from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively" he shall be guilty of an offence.

By s. 27, "If any person not being licensed to deal in game according to this Act shall buy any game from any person whatsoever, except from a person licensed to deal in game according to this Act," he shall be liable to a penalty.

1910

COOK v. TREVENER.

pheasants on a game farm are tame birds and kept mostly for eggs and breeding purposes. It is essential for the carrying on of the business that the breeders should be in possession of the pheasants during the close season. It was contended for the appellant that the word "game" in s. 27 only applied to dead game, and that if it applied to live game birds it did not apply to tame ones. The justices held that they were bound by the decision in *Harnett* v. *Miles* (1) to hold against the appellant's contention, and they accordingly convicted him subject to a case for the opinion of the Court.

Campion, for the appellant. Tame pheasants which have been reared in confinement and have never been at large are not "game." The Act only applies to wild birds. The object of the Act was to secure the preservation of game and the increase of its numbers, for which purpose it provided close seasons for different kinds of game birds respectively. But that object would be defeated if game farmers were required to take out a licence to deal in game, for it would put an end to the pheasant breeding industry. Sect. 4 prohibits any person licensed to deal in game from having in his possession any game birds after the expiration of ten days from the commencement of the breeding season, which is just the very time when a game farmer wants possession of the birds for the purposes of his business. It is true that in *Harnett* v. *Miles* (1) it was held that a pheasant breeder who without a licence to deal in game sold pheasants which he had reared from the egg under barndoor hens was guilty of an offence, but that the consequence of such a decision would be to put an end to the industry of pheasant farming altogether was not present to the mind of the Court, for the point was not taken, no counsel appearing for the defendant.

Secondly, s. 27 only applies to dead game. The class of persons who are required to have licences to deal in game are poulterers, who sell game only for consumption. The Act never contemplated the case of a person selling live pheasants. The industry of pheasant farming has grown up since the Act of 1831 was passed.

(1) 48 J. P. 455.

Bonsey, for the respondent. The case is covered by authority on both points. *Harnett* v. *Miles* (1) expressly decides that it is immaterial that the pheasant is tame; and *Loome* v. *Baily* (2) is an authority that the Act applies to live game as well as dead. If the effect of requiring a game farmer to take out a licence to deal in game is to render the continuance of the industry impossible, that is a matter for the Legislature to deal with. In *Jenner* v. *Gorringe* (3) Lush J points out that though a person not licensed to deal in game may have pheasants in his possession during close time in a pen he may not sell them.

LORD ALVERSTONE C.J. In this case the appellant was summoned under s. 27 of the Game Act, 1831, for having bought twenty-five live hen pheasants from one Williams, neither party being licensed to deal in game. Both Williams and the appellant were pheasant farmers, and the latter bought the birds in question for the purpose of obtaining their eggs in furtherance of his business. It is contended that under those circumstances a licence to deal in game was not required. It is said, first, that the word "game" in the Act means wild game and does not include game birds reared in confinement. But s. 2 says that "the word 'game' shall for all the purposes of this Act be deemed to include . . . . pheasants." It says nothing about their being wild. The point arose in *Harnett* v. *Miles*. (1) There the respondent, a pheasant breeder, set pheasant eggs under barndoor hens in coops, cutting one wing of each bird to prevent escape and facilitate identification. Having sold two cock pheasants to one of the public he was held liable to a penalty for dealing in game without a licence. If that case is right, as I think it is, the appellant's contention on this point fails. Then it is said that s. 27 only applies to the sale of dead game. But the case of *Loome* v. *Bailey* (2) is a direct authority that the words "birds of game" in s. 4, which makes it illegal to sell such birds during the close season, include live birds. And the word "game" must have the same meaning in s. 27. That is a sufficient answer to the contention,

(1) 48 J. P. 455. (2) (1860) 3 E. & E. 444.
(3) (1879) 43 J. P. 781.

1910

COOK v. TREVENER.

Lord Alverstone C.J.

and we cannot interfere with the conviction. The consequence of our decision no doubt may be that a difficulty is imposed in the way of carrying on the industry of pheasant farming by reason of the provisions of s. 4. That section provides that if any person licensed to deal in game shall have in his possession or control any bird of game more than ten days after the expiration of the time when they may be lawfully killed he shall be guilty of an offence. And it is said that that is the very time when the pheasant farmer requires to have possession of the birds for the purposes of his business. It may be that legislation is required to enable a licensed person to have live pheasants in his possession during the close season. It is possible that in the year 1831 the Legislature may have thought it undesirable that persons licensed to deal in game should have possession at all of live birds in the close season. But whether they did so or not, the fact that a natural construction on the plain language of s. 27 may put a difficulty in the way of pheasant breeding is no reason for requiring us to put a forced construction upon it. The difficulty, if any, must be dealt with by legislation.

PICKFORD J. I am of the same opinion. The appellant was charged under s. 27, which makes it an offence for a person not licensed to deal in game to buy any game except from a person licensed to deal in game. Two points were taken—first, that "game" in that section means dead game, and, secondly, that it means wild game, and does not include birds which have never at any time been at liberty. I think that we must read the words "licensed to deal in game" in s. 27 in the same sense as in s. 4, which provides that possession of any game by a person licensed to deal in game more than ten days after the commencement of the close season shall be illegal; and if so, we have express authority in *Loome* v. *Baily* (1) that the word "game" in s. 4 includes live birds as well as dead. That decision is binding on us, and even if it were not I should have no wish to disturb it. Therefore the first point fails. Then as to the contention that s. 27 only applies to wild game. The

(1) 3 E. & E. 444.

definition clause says that "the word 'game' shall for all the purposes of this Act be deemed to include . . . . pheasants." And a pheasant is not the less a pheasant because it is tame. Here again we have direct authority in the case of *Harnett* v. *Miles*. (1) It is urged that that case was not argued for the respondent. But the respondent's point was expressly stated by the justices and was overruled by the Court. No doubt this decision may have serious consequences. It is said that the industry of pheasant breeding cannot be carried on without buying and selling the birds, and that if the breeder cannot in such a case lawfully sell without having a licence to deal in game he cannot lawfully have possession of the birds during the breeding season by reason of the provisions of s. 4. I think the object of s. 4 was to prohibit a person licensed to deal in game from having any game birds, whether live or dead, in his possession during the close season. But even if that was not so, and if the consequence with which we are now pressed was not present to the mind of the Legislature, the industry which is now imperilled having come into existence since the date when the Game Act was passed, still I think we cannot disregard the plain language of the section, which we should have to do if we allowed this appeal.

LORD COLERIDGE J. No person not licensed to deal in game can buy game from any person who is not so licensed. Here the defendant, being himself unlicensed, bought live tame pheasants from an unlicensed person. The question is whether in doing so he committed an offence. Sect. 2 says that "the word 'game' shall for all the purposes of this Act be deemed to include . . . . pheasants." That must mean pheasants of all kinds, wild or tame, dead or alive. It is said that if the word 'game' is to be deemed to include live tame pheasants a difficulty arises under s. 4, which provides that, although an unlicensed person may have live pheasants in his possession during the close season subject to this, that he must not sell them, a licensed person may not have any pheasants in his possession during the close season, whether live or dead. It is

(1) 48 J. P. 455.

1910

COOK v. TREVENER.

said that that prohibition will directly interfere with the industry of pheasant farming. That may be a difficulty, but it does not prevent us from saying that the Act means what it says.

Appeal dismissed.

Solicitors for appellant: *Albin Hunt & Fourmy, Chesham.*
Solicitors for respondent: *Letts Brothers.*

J. F. C.

1910
Oct. 14, 17.

COOK *v.* HOBBS.

Revenue—Carriage—Licence—Exemption—"Used solely for the conveyance of goods or burden"—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict.* c. 8), *s.* 4, *sub-s.* 3.

By s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, a carriage licence is not required for a "cart . . . . which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry."

Where a cart is used only for the purpose of taking goods to market to be sold, the fact that the persons who are intended to sell the goods at the market are conveyed there in the cart along with the goods will not take away the cart's title to exemption.

If a cart has been constructed with a view to its being used only for the exempted purposes, the mere fact that it is capable of being used for other purposes will not deprive it of the exemption.

CASE stated by justices of the county of Devon sitting at South Molton.

The appellant, Nicholas Cook, was summoned for keeping two carriages, he having a licence only for one.

At the hearing the following facts were proved or admitted. The appellant was a farmer and ropemaker. He was in the habit of attending markets at South Molton and Barnstaple, at both of which he sold ropes. At the latter place he had two stalls in the market, one for the sale of ropes and the other for the sale of produce such as butter and eggs. He had two two-wheeled traps, one of which he used for himself and his family on all occasions when in his opinion a licensed vehicle was required, and in respect of which he was duly licensed. The

1910

COOK v. HOBBS.

following was the description of the other vehicle. It was two-wheeled, and constructed of light varnished wood mounted on springs. The shafts were attached to the under part of the body and were fitted with brass tops and brass bars or plates on the sides of the shafts to prevent the harness rubbing. Under the body was a cross-bar attached to the axle by chains for the easier drawing of the vehicle, and to this cross-bar the traces were attached, instead of being attached, as is usual in trade carts, to the shafts. There was no back seat, or box seat, but there was one movable seat of ordinary type with a padded back. The seat was held in position by being fitted with two curved iron supports. The seat had a removable cushion secured by leather straps. At the front of the trap on each side was a double step. There was no step at the back. Over both wheels were varnished splash-boards, and there was a dash-board in front, on which were two lamp sockets and a whip socket, and two irons forming hand-rails. The body of the trap was of the following dimensions: width 42 inches, length 64½ inches, height of floor from ground 38 inches. The name and address of the owner were duly painted at the side as required by law. It was admitted that the appellant held no licence for this trap. On December 2, 1909, a police constable saw the appellant with his wife and son driving it towards the appellant's house as he was returning from Barnstaple market, the trap having a market hamper in it.

The appellant used the trap for the following purposes at various times: to deliver ropes in the way of his trade to his customers, to convey calves and sheep when necessary, to convey ropes and farm produce to the markets at Barnstaple and South Molton, and to take his son and his wife with him to Barnstaple market to serve customers at his two stalls there on market days. On the day in question he and his wife and son had been to Barnstaple market in accordance with his custom, transacting the business of selling produce and ropes. The appellant never used the unlicensed trap for any purpose save those above mentioned. It had been built by a carriage builder to the appellant's order expressly for the purposes above mentioned.

The appellant contended that the trap did not require a licence

1910

COOK v. HOBBS.

on the ground that it was "constructed for use, and was used, solely for the conveyance of goods or burden in the course of trade or husbandry" within the meaning of s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888.

The justices were of opinion that the appellant and his wife and son were "burden" within the meaning of the section, and that the appellant had not used the trap except for the conveyance of goods or burden in the course of his trade or husbandry; that the trap had been constructed in good faith solely for the purpose of the conveyance of goods or burden in the course of his trade or business, but that it was capable of being used for other purposes such as the conveyance of persons only, or the conveyance of dogs or game for sport; and that the appellant was guilty of the offence charged.

Ernest Charles (*Holman Gregory* with him), for the appellant. Provided that a cart is bona fide constructed for the purpose of carrying goods, so as to make it more suitable for that purpose than any other, and is used solely for that purpose, that is sufficient to bring it within the exemption. That it is capable of being used for other purposes is immaterial, for otherwise no cart could be exempt.

Randolph, for the respondent. The conviction may be supported upon the ground that the trap was not solely used for the conveyance of burden in the course of trade. The justices ought not to have held that the appellant's wife and son were "burden" within the meaning of the section. The case of *Latchford* v. *Kelsey* (1) does not support such a finding. There is a distinction between farm labourers riding in the farm cart to or from the field where they are working and persons driving to market. In *Moore* v. *Lewis* (2), where a wardrobe dealer used a governess cart solely for the purposes of his business, going in it to private houses to solicit orders and to call for and bring away goods, it was held that the cart was not exempted, not being solely used for the conveyance of goods or burden. The present case falls within that decision.

Charles, in reply. The appellant's wife and son were

(1) (1907) 96 L. T. 620. (2) [1906] 1 K. B. 27.

"burden," for they were not only carried along with the goods that were taken to market, but were a necessary factor in the business of selling the goods when they got there.

LORD ALVERSTONE C.J. These cases upon the subject of the taxing of carts generally give us considerable difficulty, for they are usually very near the line, and the taxing Act has been so framed as to make it extremely difficult to say on which side they fall. In this case the appellant has two traps, for one of which he takes out a licence, and he uses the other, which is unlicensed, on occasions on which he considers a licence is not required. Of course that will not protect him if he is wrong. He must shew that the unlicensed vehicle is exempt. Now to entitle a cart to exemption it must be shewn that it "is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry." With regard to the second of those conditions the justices found in favour of the appellant that the trap was used solely for the purposes mentioned, and in my opinion there was no evidence which disentitled them so to find. The evidence was that the appellant used it to deliver goods to customers, to carry sheep and calves, and to carry ropes and farm produce to market, and that on market days he took with him his wife and son in the cart to help in serving customers at his stalls in the market. I am not altogether clear what the draftsman of the Act meant by the word "burden" and I am not going to attempt to define it. But I think that at all events it includes persons who are taken to a market along with goods for the purpose of assisting in selling them there, and who have to bring them back if they are not sold. I think that, provided the cart is constructed, and in other respects used, only for the carriage of goods in the course of trade, the presence of such persons in the cart will not make it taxable, any more than did the presence of the farm labourers who rode to their work in *Latchford* v. *Kelsey*. (1) Then the justices also found in the appellant's favour that the cart satisfied the condition of being

(1) 96 L. T. 620.

1910

COOK v. HOBBS.

Lord Alverstone C.J.

constructed solely for the conveyance of goods or burden. There again I am of opinion that there was nothing in the description of the cart which compels us to say that the justices could not properly so find. But the ground on which they decided against the appellant was that the cart was capable of being used for other than the permitted purposes, such as the conveyance of persons only. But every vehicle, however expressly it may have been designed for the carriage of goods, is capable of being used for other purposes, and to suggest that for that reason it ought to be taxed is to import into the statute a condition which is not there. I am satisfied that the Legislature never intended to tax such carts simply because they could carry something else than goods or burden. I think the appeal must be allowed.

PICKFORD J. I have very great doubt about the case, but I agree.

LORD COLERIDGE J. I agree. If a cart is capable of being used for agricultural purposes and is not constructed solely for such purposes it is not exempt from duty. If, however, the agricultural purposes for which it is constructed do not exclude its use for any other purposes it is not the less constructed solely for agricultural purposes if that fact be so found. That fact has been in this case so found. If, as in this case, the vehicle is constructed solely for the purpose of conveying goods or burden in the course of trade or husbandry, the mere carrying to market of a wife and son for the purpose of selling the goods does not in my opinion make the cart taxable on the ground that it is not solely used for the exempted purposes. It may be that the word "burden" was inserted in the section with the very object of meeting such a case.

Appeal allowed.

Solicitors for appellant: *Church, Rendell & Co., for A. E. Hopper, Barnstaple.*

Solicitors for respondent: *Ford, Lloyd & Co., for H. Michelmore, Exeter.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1910
Oct. 28.

ROGERS, EUNGBLUT & CO. *v.* MARTIN.

Landlord and Tenant—Distress—Exemption—Hire-Purchase Agreement—Piano let to Wife of Tenant—Goods owned by a Firm—Declaration by Owners—Signature by one Partner—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *ss.* 1, 4.

A piano, which belonged to the plaintiffs, a firm of pianoforte manufacturers, and had been let by them under a hire-purchase agreement to the wife of the tenant of a dwelling-house, was seized by the defendant, a bailiff, under a distress for rent put in by the landlord upon the demised premises. The plaintiffs thereupon served upon the defendant a declaration in writing, in pursuance of the Law of Distress Amendment Act, 1908, s. 1, stating that the piano was the property of the plaintiffs. This declaration, which was not a declaration under the Statutory Declarations Act, 1835, was signed by one member of the plaintiffs' firm with the authority of his partners. The defendant having refused to give up the piano, an action for its detention was brought by the plaintiffs against the defendant:—

Held, that the Law of Distress Amendment Act, 1908, s. 1, does not require a statutory declaration to be made in order to satisfy its terms; that it was not necessary that the declaration should be signed by all the partners in the plaintiffs' firm; and that the piano did not come within the exception created by s. 4, sub-s. 1, of the Act, inasmuch as (1.) the words "made by such tenant" in the sub-section refer not only to the word "settlement," which immediately precedes them, but also to the previous words "bill of sale" and "hire-purchase agreement," and (2.) the piano could not be deemed to have been "in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant" was "the reputed owner thereof."

Shenstone & Co. v. *Freeman*, [1910] 2 K. B. 84, followed.

Appeal from the judgment of a Divisional Court (Bray J. and Lord Coleridge J.) on an appeal from the judge of the Edmonton and Wood Green County Court.

The action was brought in the county court by the plaintiffs, a firm of pianoforte manufacturers, against the defendant, who was a certificated bailiff, for the recovery of a piano or its value.

The piano in question had been let by the plaintiffs to the wife of the tenant of a dwelling-house under a hire-purchase agreement, by the terms of which, until all the instalments of the

C. A. 1910

ROGERS, EUNGBLUT & CO. v. MARTIN.

purchase-money had been paid, the piano was to remain the property of the plaintiffs. The rent of the premises being in arrear, the landlord put in a distress under which the defendant seized the piano upon the demised premises. The plaintiffs thereupon served upon the defendant a declaration in writing in pursuance of the Law of Distress Amendment Act, 1908, s. 1, setting forth that the piano was their property, and other particulars required by that section. This declaration, which was not a statutory declaration under the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), was signed by one member of the plaintiffs' firm, which consisted of three members, with the express authority of the other partners. The defendant refusing to give up the piano, the plaintiffs brought the action in the county court. The defendant contended (1.) that the above-mentioned declaration was bad because the Law of Distress Amendment Act, 1908, required a statutory declaration; (2.) that the declaration was bad because it was not signed by all the members of the plaintiffs' firm; (3.) that the piano was not exempted by the Act from liability to the distress, because it came within the exceptions contained in s. 4, sub-s. 1, of the Act as being comprised in a hire-purchase agreement; and (4.) that it came within those exceptions, as having been in the possession, order, or disposition of the tenant of the premises by the consent and permission of the true owners under such circumstances that the tenant was the reputed owner thereof. (1)

The county court judge gave judgment for the plaintiffs, and on appeal the Divisional Court affirmed his decision.

Danckwerts, K.C. (*Humphrey Williams* with him), for the defendant. This case really involves an appeal from the decision of the High Court in *Shenstone & Co.* v. *Freeman.* (2) It must be

(1) By s. 4 of the Law of Distress Amendment Act, 1908, "This Act shall not apply—(1.) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which section twenty-nine of the Agricultural Holdings Act, 1908, applies; . . . ."

(2) [1910] 2 K. B. 84.

admitted that there is nothing in the first and second contentions set up by the defendant.

With regard to contention 3, it is submitted that, on the true construction of s. 4, sub-s. 1, of the Law of Distress Amendment Act, 1908, the words "made by such tenant" only refer to the word "settlement," which immediately precedes them, and not to the words "bill of sale" and "hire-purchase agreement," which come before it.

Fourthly, where an article like a piano is in a dwelling-house, and, like other pieces of furniture in the house, is presumably used by members of the family as such, the natural inference that a landlord would draw would be that it belonged to the tenant. The result is that it is in the possession, order, or disposition of the tenant, by the consent and permission of the true owner, under such circumstances that the tenant is the reputed owner thereof. It must be admitted that there are expressions of opinion in previous cases to the contrary of this contention: see *Simmons* v. *Edwards* (1); *Ramsey* v. *Margrett* (2); *Antoniadi* v. *Smith* (3); *In re Satterthwaite.* (4) But, when those cases are considered, it will be found that these expressions are merely dicta, and were not necessary for the judgments in those cases.

J. R. Atkin, K.C., and *Schwabe*, for the plaintiffs, were not called upon to argue.

LORD ALVERSTONE C.J. In this case the action is brought in respect of the seizure by the defendant of a piano under a distress for rent by a landlord on the premises demised to the tenant. There is no doubt that the Law of Distress Amendment Act, 1908, has made a serious inroad upon one of the landlord's remedies for the recovery of rent. Sect. 1 of that Act begins by providing that, if any superior landlord shall levy or authorize to be levied a distress on the goods of any such under-tenant as is described in the Act, or any lodger, or "any other person whatsoever not being a tenant of the premises or of any part

(1) (1847) 16 M. & W. 838.
(2) [1894] 2 Q. B. 18.
(3) [1901] 2 K. B. 589.
(4) (1895) 2 Manson's Bankruptcy Cases, 52.

C. A. 1910

ROGERS, EUNGBLUT & CO. v. MARTIN.

Lord Alverstone C.J.

thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof," then such under-tenant, lodger, or other person may serve the landlord or bailiff or other agent employed to levy the distress with a declaration as mentioned in the Act. In this case the piano seized was claimed by a firm called Rogers, Eungblut & Co., and a declaration was served on the defendant which was signed by one of the partners in that firm, and which set forth that the piano belonged to the firm, and the other matters required by the section. Prima facie, therefore, the piano was exempt from distress under the Act, but the defendant asserts that it came within the terms of s. 4, sub-s. 1, of the Act, and, therefore, the exemption given by the Act does not apply; and Mr. Danckwerts has accordingly contended that such is the case. He declined, quite rightly, if I may say so, to argue that the declaration under s. 1 of the Act must be a statutory declaration. The words of the section only require a declaration in writing, and I do not see any ground for saying that the meaning is that there must be a statutory declaration. The next point taken was that the signature of the declaration was not sufficient, because there were two other members of the firm besides the member who signed it. But the Act does not say that the declaration must be "signed" by every one of the claimants; it is sufficient if it is "made" by them, and I can see no objection to a declaration which is made on behalf of a firm by one of the partners with the authority of the other partners.

Failing on these two points, Mr. Danckwerts fell back on two others. The piano in this case was hired by the tenant's wife from the plaintiffs under a hire-purchase agreement, and it is argued that it is not within the exemption given by the Act, because it comes within the words in s. 4, sub-s. 1, which except from the operation of the Act "goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant." I think it is clear that, in order to make good sense of that provision, the words "made by such tenant" must be construed as referring to all the words that have gone before, and not merely to the word "settlement." It would be absurd, in my opinion, to construe it as meaning that, where a person's

goods would otherwise be within the exemption given by the Act, they would be taken out of it, if that person had raised money on the security of a bill of sale upon them. The only reasonable construction is, I think, that the goods are not to be exempt under the Act where the tenant has made a bill of sale, hire-purchase agreement, or settlement comprising them.

With regard to the last point raised Mr. Danckwerts admits that there are expressions of opinion in the judgments in certain cases contrary to his contention, but he suggests that they are only obiter dicta, or, at any rate, not so necessary for the purposes of those judgments as to amount to binding decisions. I do not quite agree with that as to all of them. But, apart from authority, I could not take the view for which Mr. Danckwerts contends. Since the Married Women's Property Acts, a married woman may have property belonging to herself although she is living with her husband. It would be in the teeth of those Acts if it were to be held that goods belonging to her must be deemed to be in the order and disposition of the husband as reputed owner of them merely because they are found on premises where the wife is living with the husband. In my opinion, where the wife hires goods, the mere fact that they are found on the premises where she is living with the husband is not sufficient to satisfy the words of the sub-section. The authorities to which we have been referred, and which are in my opinion binding upon us, appear to me to negative that contention. Under the circumstances it is impossible to suggest that the mere fact that this piano, which was hired by the tenant's wife under a hire-purchase agreement, and which belonged to the firm from which it was hired, was found on the demised premises shews that it was "in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof." I think this appeal must be dismissed.

BUCKLEY L.J. I agree. The first two points are that the declaration mentioned in s. 1 of the Law of Distress Amendment Act, 1908, must be a statutory declaration, and that, it having to be made by a firm, the signature of it by one member of the firm

C. A. 1910

ROGERS, EUNGBLUT & Co. v. MARTIN.

Buckley L.J.

on behalf of the firm is not sufficient. Those points were given up by Mr. Danckwerts. There is, I think, nothing in them. With regard to the third point, in my opinion it is plain that the words in s. 4, sub-s. 1, "made by such tenant" are to be read, not as confined to the previous word "settlement," but as extending to the other words "bill of sale" and "hire-purchase agreement." Any other construction would, I think, be ungrammatical, and would lead to such absurd consequences as to be quite impossible. The last point appears to me to be covered by the authorities to which we have been referred.

KENNEDY L.J. concurred.

Appeal dismissed.

Solicitor for plaintiffs: *H. E. Tudor.*
Solicitors for defendant: *Herbert Reeves & Co.*

E. L.

C. A. 1910 *Nov.* 10.

[IN THE COURT OF APPEAL.]

HORN *v.* THE LORDS COMMISSIONERS OF THE ADMIRALTY.

Employer and Workman—Compensation—Contracting-out Scheme of Compensation—Employer's Liability—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 3, *sub-s.* 1.

A workman who has agreed to accept a scheme of compensation certified by the Registrar of Friendly Societies as fulfilling the conditions imposed by s. 3 of the Workmen's Compensation Act, 1906, is outside the provisions of the Act altogether, and therefore the question of the employer's liability is to be determined solely by the scheme.

APPEAL from an award of the county court judge of Portsmouth sitting as arbitrator under the Workmen's Compensation Act, 1906.

On January 14, 1908, George Horn, who was employed as a tinsmith in His Majesty's Naval Ordnance Store Department, signed a printed form of contract to be signed by workmen who elected to come under the provisions of a scheme of compensation certified by the Chief Registrar of Friendly Societies under

date of December 16, 1907, as providing scales of compensation not less favourable to the workmen and their dependants than the corresponding scales in the Workmen's Compensation Act, 1906, and he thereby agreed that the provisions of the scheme should be substituted for the provisions of the Act during the continuance of his employment as a tinsmith or his employment in any other capacity in the said department or in any other dockyard or Admiralty establishment, and to accept the provisions of the scheme as substituted as aforesaid for himself, his personal representatives and dependants, and all other persons entitled to payment and compensation or expenses under the provisions of the said Act in lieu of the provisions of the said Act.

The scheme provided (clause 1) that when it was established to the satisfaction of the Treasury that the death of a workman had resulted from an injury to which the provisions of the Workmen's Compensation Act, 1906, applied, and that the workman had left any dependants wholly or partially dependent upon his earnings at the time of his death, a certain scale of remuneration should be payable to the dependants, and (clause 2) authorized the Treasury to grant a pension to the widow in lieu of a lump sum in certain cases. By clause 15, "Workmen who do not contract that the provisions of the scheme shall be substituted for the provisions of the Act, or who at any time withdraw from the scheme, must thenceforward be dealt with, in cases of injury, solely in the manner provided by the Act; and any benefits, in cases of injury, which such workmen now receive can no longer be accorded."

On December 12, 1909, Horn died from lead poisoning arising from his employment.

The widow, on behalf of herself and infant children, claimed compensation against the Lords Commissioners of the Admiralty, who at first denied liability on the ground that the death was not due to lead poisoning, but subsequently promised to give the matter their consideration. The widow then filed an application for arbitration.

The respondents by their answer alleged (1.) that the applicant was precluded from making the application by the fact that the

C. A. 1910

HORN v. LORDS COMMISSIONERS OF THE ADMIRALTY.

deceased had agreed to a scheme of compensation, and (2.) that the death did not result from an injury to which the provisions of the Act applied; but at the hearing they admitted their liability to pay compensation under the scheme.

The county court judge was of opinion that the intention of s. 3 of the Workmen's Compensation Act, 1906, was to give effect to any duly certified scheme as to the scale of compensation, and only as to the scale, and that all other provisions of the Act were to be applicable to any claim under the scheme except in so far as they might be varied by the scheme itself. He therefore made an award in favour of the applicant for the amount of compensation admitted to be due with costs.

The respondents appealed.

Rowlatt and *Pease*, for the appellants. The county court judge has made an award declaratory of liability, leaving the amount of compensation to be decided by the appellants. That award was made without jurisdiction. The effect of sub-s. 1 of s. 3 (1), the contracting-out section, is that, if a scheme of compensation has been duly certified in the manner therein mentioned and any workman elects to come in under it, the provisions of the scheme, as between the employer and any such workman, shall be substituted for the provisions of the Act. That means substituted for all purposes, and there is no ground

(1) Sect. 3, sub-s. 1, of the Workmen's Compensation Act, 1906: "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

for the view that the object of the Legislature was to exclude the operation of the Act in respect of the amount of compensation only.

Cababé and *Emery*, for the respondent. Under s. 3 the only question which the registrar has to consider is as to "scales of compensation." These are the dominant words of the section. Prima facie the object of the Legislature was to prohibit contracting out, and liability as distinguished from compensation is not touched. Therefore the jurisdiction of the county court judge as to liability is not ousted. To hold otherwise might lead to serious injustice. By this scheme, in order to entitle the dependants to compensation, it must be shewn "to the satisfaction of the Treasury" that the death resulted from an injury to which the Act applied, that is to say, the employer is made the arbiter in his own case, and although it is not suggested that the Treasury would act otherwise than fairly, this might not be true of all employers, and the principle is a dangerous one.

[Reference was made to the following authorities :—*Haworth* v. *Andrew Knowles & Sons, Ld.* (1); *Wilson* v. *Ocean Coal Co.* (2); *Taylor* v. *Hampstead Colliery Co.* (3); *Moss* v. *Great Eastern Railway.* (4)]

COZENS-HARDY M.R. This appeal raises a question as to the true construction of s. 3 of the Workmen's Compensation Act, 1906. Speaking for myself, I think this is one of the best-drawn sections in the Act, and certainly it is one upon the construction and effect of which I have not been able from the beginning to entertain the smallest doubt. The section says this: A workman may under certain conditions make a contract with his employer to contract out of the Act, and those conditions are threefold; first, that the scheme must give a scale of compensation not less favourable than that in the Act; second, that if there is any contribution provided by the workmen the scheme must have regard to that and confer benefits at least equivalent to the contribution in addition to the benefits to which the workmen would have been entitled under the Act; and, third, that there must have been a vote taken of the workmen to be affected by

(1) (1903) 19 Times L. R. 658.
(2) (1905) 21 Times L. R. 621.
(3) [1904] 1 K. B. 838.
(4) [1909] 2 K. B. 274.

C. A. 1910

HORN v. LORDS COMMISSIONERS OF THE ADMIRALTY.

Cozens-Hardy M.R.

the scheme, a majority of whom, ascertained by ballot, must have voted in favour of it. If those three conditions are complied with, —and it is left to the registrar to be satisfied and to certify that those conditions have been fulfilled—that scheme, whatever its contents may be, is one which an individual workman may contract with his employer to accept in substitution for the provisions of the Act. But to say that a scheme in respect of which a workman can contract must be a scheme which deals with nothing but the amount of compensation is really to make the whole section, which otherwise is perfectly clear, ambiguous, and to make the provision for schemes under this Act absolutely unworkable and meaningless. That the true meaning of the section is that which I have stated seems to me to be too clear for argument. I feel so little doubt about it that I have great difficulty in knowing how to deal with the arguments which have been addressed to us on behalf of the dependants. It is said that, because the registrar's duties are confined to these three items I have mentioned,—and I assume, without deciding it, that his duties are so confined—the scheme can contain nothing else. I cannot follow that. By the Act of Parliament the workman is at perfect liberty either to accept or to refuse the scheme. It cannot (by sub-s. 3 of this same section) contain an obligation upon the workman to join the scheme ; it is left to the individual workman to say, Aye or No, will he or will he not come in under a scheme guarded and protected by those provisions, but a scheme in no way limited to those provisions, containing such other terms as the parties may think fit to put into it. [The Master of the Rolls then referred to the agreement of the workman to accept the scheme and to the provisions of the scheme, and continued.] In my opinion it is perfectly clear that a workman who has come under that scheme and signed that agreement is outside the provisions of the Act altogether, and the county court judge had no jurisdiction to deal with any question of liability or amount or anything else. He was not arbitrator under the Act between the parties to this action.

FLETCHER MOULTON L.J. Under the Workmen's Compensation Act of 1906 a workman is permitted to contract himself out

of the benefits of that Act, provided that certain conditions are complied with in connection with the scheme which he accepts in lieu thereof. It is common ground that those conditions have been satisfied in respect of this scheme. It is common ground that the workman, having power to accept the benefits of the scheme in lieu of the benefits of the Act, did so. Now what is the consequence of his doing so? That is stated in s. 3 of the Act with a clearness that leaves nothing to be desired. It says that the workman may contract "that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme." The consequence is that we have to look to the scheme solely to find the liability of the employer. In other words the workman's right to compensation is purely contractual and is the same as if this Act did not exist. That being so, the county court judge has no jurisdiction to hear any application in connection with the compensation due to this workman.

FARWELL L.J. I am of the same opinion. The Act seems to me clear. It provides that the workmen shall not contract out of the Act except in one specified case, and in that particular specified case they may contract as they please, subject only to the certificate of the Registrar of Friendly Societies as to certain things. On the issue of such certificate the contract stands in just the same position as if the Act had never been passed. I see no room for argument in the matter.

Appeal allowed.

Solicitor for appellants: *The Treasury Solicitor.*
Solicitor for respondent: *A. L. Kent.*

H. B. H.

C. A. 1910 Nov. 12.

[IN THE COURT OF APPEAL.]

HOSEGOOD & SONS *v.* WILSON.

Employer and Workman—Compensation — Recorded Agreement — Review— Reduction of Weekly Payment as from antecedent Date—Over-payment— Default in respect of reduced Payments—Leave to issue Execution—Plea of Payment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 19; *Sched. II., par.* 9.

Where under the Workmen's Compensation Act, 1906, an application is made to reduce as from a definite antecedent date a weekly payment of compensation under a recorded agreement, and a reduction is ordered as from that date, the amount overpaid under the agreement between the date from which the reduction is to take effect and the date of the order cannot be treated as a payment in advance pro tanto of the subsequent reduced weekly payments.

But *semble* the amount overpaid may be recovered from the workman by action.

Appeal from an order and certificate made by the judge of the City of London County Court under r. 67 of the Workmen's Compensation Rules, 1907—1909. (1)

On July 16, 1908, John Wilson sustained an injury from an accident arising out of and in the course of his employment, and compensation at the rate of 14*s.* 7*d.* per week was paid him from that day until February 25, 1910, when, in consequence of the certificate of the medical referee as to the man's condition, the compensation was stopped. Wilson thereupon sent a memorandum of agreement to the registrar of the county court for registration, and, notwithstanding the opposition of the employers, the memorandum of agreement was ordered by the judge to be recorded on April 5, 1910. Under this agreement the employers were bound to pay compensation at the rate of 14*s.* 7*d.* per week from February 25, 1910, until such time as

(1) Rule 67: "(1.) When a party liable to pay compensation or costs under any award, memorandum, or certificate has made default in payment of the amount awarded, or where payment is to be made by instalments, of any instalment, execution may issue against his goods without leave for the amount in payment of which he has made default.

"(2.) Where such sum is not payable into Court, the party applying for execution shall satisfy the registrar, by affidavit or otherwise, as to the amount in payment of which default has been made."

they could get the amount reduced or terminated. On April 7, 1910, the employers applied for a termination or reduction of the payments under the agreement as from February 18, 1910, and on July 4, 1910, the county court judge made an award reducing the payments to 10*s.* per week as from the date mentioned in the application. It followed that the employers, having paid 14*s.* 7*d.* per week from February 18 to July 4, had paid too much for twenty weeks, or 4*l.* 11*s.* 8*d.* too much in all, and they accordingly stopped payment of the reduced compensation with a view to making up the over-payment.

When two weeks' payments of 10*s.* each were unpaid, the workman applied to the registrar for leave to issue execution for 1*l.* The registrar referred the matter to the judge, who certified that the employers had made default in payment of the sum of 1*l.* due under the award of July 4.

The employers appealed.

Ellis Hill, for the appellants. The county court judge proceeded on par. 19 of Sched. I. of the Workmen's Compensation Act (1), but that paragraph does not apply. Between the date from which the reduction was to take effect and the order for reduction the appellants were paying more than they ought to have done, and they were entitled to treat that excess as payment in advance of the subsequent compensation. The liability of an employer under the Act is not for weekly payments, but for compensation, but the mode of ascertaining that compensation is by weekly payments. This excess is to be treated as an instalment of compensation, and there is nothing in the Act to prevent the payment of instalments in advance. By consent of the parties the weekly payments might be paid quarterly or monthly. The payment of this extra sum constitutes payment as contradistinguished from set-off, and it is a payment made under compulsion of law, for by par. 9 of Sched. II. the memorandum of agreement is enforceable as a county

(1) Sched. I., par. 19: "A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same."

C. A. 1910

HOSEGOOD & SONS v. WILSON.

court judgment. This is analogous to the case of *Sapsford* v. *Fletcher* (1), where a tenant, in answer to a claim for arrears of rent, successfully pleaded a payment, under threat of distress, of ground rent to the superior landlord. See Smith's Leading Cases (11th ed.), vol. 1, p. 162.

[FARWELL L.J. That is a peculiarity of the law of landlord and tenant; the position of a workman under par. 19 appears to me to be rather analogous to that of a married woman restrained from anticipation.]

Unless this excess can be treated as a payment in advance the employer will have no effective remedy, since an action to recover the money would in most cases prove futile.

[COZENS-HARDY M.R. Is there power to reduce payments as from an antecedent date?]

Charing Cross, Euston, and Hampstead Ry. Co. v. *Boots* (2) seems to shew that there is, provided that a definite antecedent date for the reduction is mentioned in the application to review.

J. I. Macpherson, for the respondent, was not called upon.

COZENS-HARDY M.R. This is a short and rather curious point in a case where there was an admitted accident, an admitted liability, and a recorded agreement to pay 14*s.* 7*d.* a week to the workman and an application to review that payment as from some day in February last. That is quite clearly specified in the application to review. The learned judge acceded to that application and reduced the compensation as from February to 10*s.* a week. The effect of the recorded agreement for the 14*s.* 7*d.* a week was, of course, that execution might be issued in respect of it, and precisely the same was the effect of the agreement to pay the reduced sum of 10*s.* a week. The 10*s.* a week not having been paid, the workman applied under r. 67 for leave to issue execution. The employers then said "It is true that we have not paid this 10*s.*, pursuant to the order, for these particular weeks, but we paid the workman, as we were bound to do, 14*s.* 7*d.* a week regularly until the learned judge reduced it, and we ought, therefore, to be considered to have paid not merely 10*s.* a week from February up till now, but also for so

(1) (1792) 4 T. R. 511. (2) [1909] 2 K. B. 640.

many more weeks as are necessary to make up the difference between 14*s.* 7*d.* and 10*s.*" The answer to that seems to me to be found in par. 19 of the First Schedule. "A weekly payment shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same." On behalf of the appellants it has been ingeniously argued that, although they were under a legal obligation to pay 14*s.* 7*d.* a week, they must be considered to have paid 10*s.* a week only in pursuance of their legal obligation, and that the 4*s.* 7*d.* was something which they were entitled—I must not use the words "to set off," because if I do they are out of court at once—but to apply or to be deemed to have applied in payment of the subsequent 10*s.* a week. I think that that would be directly contrary to the policy of the law. Farwell L.J. has instanced the case of a married woman restrained from anticipation. That is undoubtedly very nearly, if not precisely, the position which a workman occupies in respect of weekly payments under this Act. I think that the learned judge was quite right in the view that he took, that, although the employers may have a right, and I imagine have a right, to recover from the workman the excess of the 14*s.* 7*d.* over the 10*s.* a week from February up to the date of the order, that is really a separate cause of action, and that excess cannot be regarded as in any way a payment in advance of any future weekly payments. It was only a payment in respect of the then existing obligation to pay the 14*s.* 7*d.* a week pursuant to the agreement. In my opinion the learned judge was quite right, and the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. It is clear by par. 19 that it is intended that the weekly payments that are awarded to workmen by way of compensation should be paid to them and should not be allowed to be subject to set-off or cross-claim.

In the present case the decision of the learned county court judge establishes that the employers have, during certain past weeks, paid, under compulsion of law, a sum larger than they ought to have paid. The balance they can clearly recover from

C. A. 1910

HOSEGOOD & SONS v. WILSON.

the workman. But it is suggested that they are entitled to take the sums so paid as being paid on account of future weekly payments. My first answer is that as a fact they were not, and my second answer is that under par. 19 by law they cannot be, so paid on account.

For these reasons I think that this appeal must be dismissed.

FARWELL L.J. I agree. The most plausible way of putting the appellants' case appears to me to be to say, as was said by Mr. Ellis Hill, that the Act gives compensation, and, although the amount may be varied from time to time, it is still the same compensation. The difficulty which is in his way and which seems to me to be insuperable is that the amount of the weekly payment so settled cannot in any way be either assigned, charged, or attached, and that necessarily includes anticipation. It would be strange if the employer, who can recover by process of law the amount that he has paid in excess, cannot set off the amount so recovered as damages against future payments, but can do so without any process of law at all. I think that it was intended to extend this protection in order to protect the workman against himself, and this bears out the scheme in the preceding par. 17, where the whole sum may be commuted by agreement, but only after that agreement has been referred to and approved by the registrar. It would seem to follow that neither the whole nor any portion can be commuted by receiving money in advance.

I therefore agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitor for respondent: *J. Scott Duckers.*

H. B. H.

CLARE *v.* DOBSON.

1910

Oct. 19, 20.

Landlord and Tenant—Lease—Underlease—Covenants to Repair in similar Terms—Breach by Lessee—Forfeiture—Relief—Costs—Breach by Underlessee—Damages—Remoteness.

An underlease made in 1887 contained covenants by the underlessee to repair in general terms and to repair within three months after notice in writing, and a proviso for re-entry on breach of the underlessee's covenants. The underlease shewed on its face that the reversion was a leasehold reversion. The head lease made in 1855 contained covenants to repair and a proviso for re-entry in substantially the same terms as those of the covenants and proviso in the underlease of 1887. The head landlord served on his lessee a notice in writing to repair; that lessee served a similar notice on his underlessee, who failed to do the repairs within three months. The head landlord thereupon brought an action for the recovery of the demised premises. The repairs were subsequently executed and the lessee applied for and obtained relief against forfeiture.

In an action by the lessee against the underlessee for breach of covenant to repair in the underlease:—

Held, that the plaintiff could not recover the costs of the proceedings for relief.

Dictum of Lindley L.J. in *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, followed.

Trial of action before Lord Coleridge J. without a jury.

By an indenture of lease dated July 8, 1887, and made between George Abbott and William Abbott of the one part and the defendant of the other part, the said George Abbott and William Abbott, being possessed of the residue of a term of ninety-nine years from December 25, 1851, in respect of the premises hereinafter mentioned, demised to the defendant the ground with the two messuages or premises thereon known as Nos. 11 and 13, Cambridge Street, Newington, in the county of Surrey, for the term of sixty-three and a half years less twenty-one days at an annual rent of 6*l.* payable as therein provided. This lease shewed on the face of it that it was an underlease and not a lease by a freeholder, there being several references therein to "the superior landlords."

By the same lease the lessee covenanted that he would during the term thereby granted keep in good repair and well cleansed

1910

CLARE v. DOBSON.

the messuages and buildings which were or should be erected upon the ground thereby demised and all the drains, cesspools and sewers, and all the walls and fences thereto belonging, and the said messuages and buildings so in good repair and well cleansed at the expiration of the said term thereby granted or other sooner determination thereof which should first happen would peaceably and quietly leave, surrender, and yield up unto the lessors together with all fixtures then upon the demised premises or which should have been used therewith at any time within two years next before the expiration or other sooner determination of the demise in good condition, and also that it should be lawful for the lessors and for the superior landlords of the demised premises and for their or any of their agents and surveyors for the time being with or without workmen at any convenient time in the day as often as such persons or any of them should think proper to enter upon the demised premises or any part thereof to see and search as to the condition of the same, and of all defaults and wants of reparation which upon any such view should be found to leave notice in writing or otherwise at the demised premises unto and for the lessee to repair and amend the same within three calendar months after such notice thereof, and also that he would after such notice should be left as aforesaid within the said three calendar months accordingly repair and amend all such defaults and wants of reparation whereof such notice should have been left as aforesaid.

The lease also contained a proviso that in case the lessee should not well perform and keep the covenants and agreements therein contained and on his part to be performed and kept it should be lawful for the lessors to re-enter and the lessee and all other occupiers thereof thereout to expel and remove.

George Abbott and William Abbott, the lessors of the plaintiff, were themselves liable to a superior landlord as lessees of the premises under a lease dated June 30, 1855, containing substantially the same covenants as those contained in the lease of July 8, 1887.

After divers mesne assignments and acts in the law, ultimately by an indenture dated December 23, 1897, and made between Edward James Barrett of the one part and the plaintiff of the

other part, the lease of June 30, 1855, and the reversion expectant on the determination of the lease of July 8, 1887, became vested in the plaintiff. The defendant had paid rent to the plaintiff as assignee of the reversion.

On or about May 5, 1908, the plaintiff received a notice from the superior landlord to repair within three months from the date thereof, and on June 10 served upon the defendant at the demised premises a duplicate of the notice with particulars of the dilapidations therein contained and other dilapidations, requiring him to repair accordingly.

The defendant did not repair the premises in accordance with the notice, but allowed them to remain out of repair.

On or about October 19, 1908, the superior landlord commenced an action against the plaintiff for the recovery of the said premises by reason of their being out of repair as aforesaid. The plaintiff entered an appearance as defendant. The defendant obtained leave under Order XII., r. 25, of the Rules of the Supreme Court to appear and defend also.

In January, 1909, the repairs were executed, and on February 24, 1909, relief from forfeiture was granted to the plaintiff under an order staying proceedings in the landlord's action on payment of fifteen guineas for rent and of costs as between solicitor and client without prejudice to any claim by the plaintiff against the defendant.

The plaintiff alleged that by reason of the defendant's defaults and the said proceedings arising therefrom he became liable for and paid to his superior landlord the sum of 64*l.* 14*s.* for taxed costs and became liable for 25*l.* costs as between solicitor and client and 10*l.* 10*s.* for surveyor's fees.

The plaintiff on account of these items claimed 100*l.* 4*s.*

S. H. Leonard, for the plaintiff. The defendant in this case had both actual and constructive notice that the plaintiff was under covenant with his superior landlord to keep the demised premises in repair, and that if they were not kept in repair the superior landlord might and most probably would re-enter, and, as a consequence, that the plaintiff would incur costs and expenses in obtaining relief from the forfeiture. These costs

1910

CLARE v. DOBSON.

and expenses therefore are damages such as may reasonably be supposed to have been in the contemplation of both the plaintiff and the defendant as the probable result of a breach by the defendant of his covenant to repair contained in the underlease. They are therefore recoverable in this action: *Hadley* v. *Baxendale* (1); *Hammond* v. *Bussey* (2); *Agius* v. *Great Western Colliery Co.* (3) This principle has been applied to covenants between underlessors and underlessees; the former can recover for breach of covenant by the latter damages in respect of their liability over to their superior lessors: *Ebbetts* v. *Conquest* (4); *Conquest* v. *Ebbetts.* (5)

Foà, for the defendant. This case is covered by authority. Where a lessee has been sued by his lessor and cast in damages and costs for breach of covenant, and he sues his sub-lessee for breach by him of a covenant in the same terms, he cannot recover from his sub-lessee the costs he has had to pay to his superior landlord unless he has a covenant or agreement for indemnity with his sub-lessee: *Penley* v. *Watts* (6); *Walker* v. *Hatton* (7); *Blyth* v. *Smith* (8); *Logan* v. *Hall.* (9) This is recognized by Lindley L.J. in *Ebbetts* v. *Conquest* (4), the case relied on by the plaintiff. It was held in that case that in assessing the damages for a breach of covenant to repair in an underlease the liability of the underlessor to his superior lessor may be taken into account where the underlessee has notice that there is a superior lessor; but Lindley L.J. in the course of his judgment (10) said: "There is not in this underlease any covenant to indemnify the immediate lessor against his liability to his superior landlord in respect of repairs, and under these covenants the immediate lessor cannot get nearly so much in the shape of damages as he might if he were suing upon a covenant for indemnity—for instance, he could not recover the costs of proceedings brought against him by the superior landlord." The fallacy in the plaintiff's argument is in assuming that because the covenants

(1) (1854) 9 Ex. 341.
(2) (1887) 20 Q. B. D. 79.
(3) [1899] 1 Q. B. 413.
(4) [1895] 2 Ch. 377.
(5) [1896] A. C. 490.
(6) (1841) 7 M. & W. 601.
(7) (1842) 10 M. & W. 249.
(8) (1843) 5 Man. & G. 405.
(9) (1847) 4 C. B. 598.
(10) [1895] 2 Ch. 377, at p. 382.

to repair in the underlease and the superior lease are substantially in the same terms they therefore impose the same obligation. They do not do so: *Walker* v. *Hatton*. (1) They are quite separate and distinct. Even if the defendant had performed his covenant it does not follow that the plaintiff's covenant would ipso facto have been performed. A general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate: *Walker* v. *Hatton* (1); Mayne on Damages, 8th ed., p. 120. The plaintiff's covenant began to operate in 1855; that of the defendant did not begin to operate until 1887; performance of the later covenant is not likely to constitute performance of the earlier. But what caused the forfeiture and the consequent application for relief with its incidental costs was the breach of the earlier and not the breach of the later covenant, in other words the breach of the plaintiff's own covenant and not the breach of the defendant's. The plaintiff is the author of his own wrong. It is no answer for him to say that by underletting to the defendant his predecessors in title had put it out of his power to enter and do the necessary repairs himself. They might have reserved power to themselves and their assignees to do so; or they might have taken an indemnity from the defendant, or a covenant from him to perform the covenants in the head lease, which amounts to an indemnity: *Hornby* v. *Cardwell*. (2) Having done neither the one nor the other, they and their assignee, the plaintiff, are the parties in default. But if the forfeiture was due partly to his own default the plaintiff cannot recover the costs of obtaining relief: *Clow* v. *Brogden* (3); *Logan* v. *Hall*. (4)

Leonard in reply. The cases cited on behalf of the defendant are all earlier in point of time than *Hadley* v. *Baxendale* (5) and belong to the period when it was thought that damages must be the necessary consequence of the breach of contract complained of. Since *Hadley* v. *Baxendale* (5) it is not the chain of causality but the contemplation of the parties that decides

(1) 10 M. & W. 249.
(2) (1881) 8 Q. B. D. 329.
(3) (1840) 2 Man. & G. 39.
(4) 4 C. B. 598.
(5) 9 Ex. 341.

1910

CLARE v. DOBSON.

what damages are recoverable. It is said that the forfeiture and subsequent proceedings for relief were the result of the plaintiff's breach of covenant and not the result of the defendant's breach; but so in *Hammond* v. *Bussey* (1) the damages and costs recovered by the sub-vendees of the plaintiffs were recovered by reason of the plaintiffs' breach of contract and not by reason of the defendant's breach; but they were none the less held to be recoverable by the plaintiffs for the defendant's breach. The same applies to *Agius* v. *Great Western Colliery Co.* (2) In the present case the defendant had constructive notice of the covenants in the head lease; he knew that his breach of covenant would in fact bring the head landlord upon the scene; the proceedings for relief follow naturally, and the defendant is liable for the costs of those proceedings.

Cur. adv. vult.

Oct. 20. LORD COLERIDGE J. read the following judgment:— On October 19, 1908, one Thomas, as lessor, brought an action for possession and for rent, and for damages for breach of the lessee's covenant to repair, against the plaintiff in respect of a number of houses, including Nos. 11 and 13, Cambridge Street. This lease bore date June 30, 1855.

By a lease bearing date July 8, 1887, the plaintiff's predecessors in title sub-let the premises to the defendant. The covenant to repair ran in the same terms as that in the head lease; there was power reserved to the plaintiff's predecessors in title and to the superior landlord to enter and view the premises with a view to observing the condition as to repair. In both leases there was a three months' notice to repair provided for, which, if not complied with, worked a forfeiture. There was no covenant in the sub-lease of indemnity against the covenants in the head lease, nor was there any covenant to perform the covenants in the head lease. On December 23, 1897, the reversion on the lease of July 8, 1887, became vested in the plaintiff.

On May 5, 1908, notice to repair was given by the superior landlord to the plaintiff.

On June 10, 1908, the plaintiff served a notice to repair on

(1) 20 Q. B. D. 79. (2) [1899] 1 Q. B. 413.

the defendant. There was an admitted default; the notices were not complied with, and on October 19, 1908, Thomas, the head landlord, brought his action.

On October 29, 1908, the defendant obtained an order under Order XII., r. 25, permitting him to appear and defend.

By January, 1909, the repairs were executed.

On February 24, 1909, the plaintiff obtained an order, to which the defendant was not a party, for relief against forfeiture on payment of fifteen guineas for rent and on payment of costs as between solicitor and client without prejudice to any claim by the plaintiff against the defendant.

The question is whether these costs so paid by the plaintiff are recoverable as against the defendant.

If the sub-lease had contained a covenant of indemnity or an express covenant to perform all the covenants and conditions of the original lease, as was the case in *Hornby* v. *Cardwell* (1), it is clear that these costs would be recoverable if reasonably incurred, and if within the reasonable contemplation of the parties; but that is not this case. The mere fact that the covenants in the two leases run in the same terms does not carry with it the inference, where the two leases are of different dates, that the covenants bear the same obligations: *Walker* v. *Hatton* (2), approved by Lord Coleridge C.J. in *Williams* v. *Williams*. (3) Indeed where, as here, the sub-lease recognizes the existence of the head lease, the presumption is that the sub-lessee undertook only the limited liability imposed upon him by the covenants in the sub-lease. Here the costs incurred are the result of the plaintiff's own breaches of covenants, and in the absence of any such covenant of indemnity or covenant to perform the covenants in the head lease as I have alluded to, costs, the result of such breaches, cannot be recovered: *Penley* v. *Watts* (4), approved in *Logan* v. *Hall* (5); see also the observations of Tindal C.J. in *Blyth* v. *Smith* (6), distinguishing that case from *Penley* v. *Watts* (4), and shewing that the latter case was good law on the ground that the plaintiffs had broken the covenants

(1) 8 Q. B. D. 329.
(2) 10 M. & W. 249.
(3) (1874) L. R. 9 C. P. 659.
(4) 7 M. & W. 601.
(5) 4 C. B. 598.
(6) 5 Man. & G. 405.

1910

CLARE v. DOBSON.

Lord Coleridge J.

into which they had entered to keep the premises in repair, which is the fact here.

At one time it was thought that, as in this case, the lessee having put it out of his power to enter for the purpose of repairing, the sub-lessee was liable for all the damages resulting from the breach of the lessee's covenant to repair, but *Neale* v. *Wyllie* (1) is no longer law. (2) Furthermore, if the lessee had entered and repaired to save the forfeiture, it would appear that he could only have recovered nominal damages against the sub-lessee: *Williams* v. *Williams*. (3) Have these cases been disturbed by the later cases, *Agius* v. *Great Western Colliery Co.* (4), approving *Hammond* v. *Bussey* (5), and following *Hadley* v. *Baxendale* (6)? In *Agius* v. *Great Western Colliery Co.* (4) Lord Halsbury said: "It was laid down in 1854 in the case of *Hadley* v. *Baxendale* (6), and has ever since been accepted as the guiding rule of law as to the measure of damages in an action of contract, that, when two parties have made a contract which one of them has broken, then, if the damages claimed in respect of the breach of contract are such as may be fairly and reasonably considered as arising naturally, i.e., according to the usual course of things, from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it, they are recoverable." I can find no case where this broad principle has been applied to such a case as this, and in *Ebbetts* v. *Conquest* (7), which applies it to lessees and underlessees, this particular case is expressly excepted by Lindley L.J., who says: "There is not in this underlease any covenant to indemnify the immediate lessor against his liability to his superior landlord in respect of repairs, and under these covenants the immediate lessor cannot get nearly so much in the shape of damages as he might if he were suing upon a covenant for indemnity—for instance, he could not recover the costs of proceedings brought against him by the superior landlord."

(1) (1824) 3 B. & C. 533.
(2) See *Logan* v. *Hall*, 4 C. B. 598.
(3) L. R. 9 C. P. 659.
(4) [1899] 1 Q. B. 413.
(5) 20 Q. B. D. 79.
(6) 9 Ex. 341.
(7) [1895] 2 Ch. 377.

1910

CLARE v. DOBSON.

Lord Coleridge J.

It appears to me therefore—the third party procedure having here no application—that upon the facts of this particular case I am bound by authority. If I am incorrect in my statement of the law as it now exists, another Court than this must so determine. I therefore give judgment for the defendant.

Judgment for defendant.

Solicitor for plaintiff: *A. A. Nowell.*

Solicitors for defendant: *Winter, Bothamley & Co.*

W. H. G.

1910

Oct. 26.

WIXON *v.* THOMAS. LAMBERT *v.* THOMAS. BURROWS *v.* THOMAS.

Justice of the Peace—Poor Rate—Exemption—Distress Warrant—Jurisdiction to refuse Warrant—Property acquired and used for Purposes of the Crown — Territorial Force — County Association — Officer's Quarters—Territorial and Reserve Forces Act, 1907 (*7 Edw. 7, c. 9*).

Houses acquired by a county association under the Territorial and Reserve Forces Act, 1907, for use, and in fact used, as residences for officers of the Territorial Force, are occupied by servants of the Crown for the purposes of the Crown, and are therefore exempt from rateability to the poor rate. This exemption is a matter which may be raised before and considered by justices on an application for a distress warrant to enforce a rate made upon such an officer in respect of a house so acquired.

Whether such an officer is the occupier of a house so acquired, *quære.*

Justices are not bound to issue a distress warrant if on the undisputed facts before them it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought not to have been inserted in the rate-book.

CASES stated by the justices of the borough of Southend.

By s. 1 of the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), it is enacted that for the purposes of the reorganization of His Majesty's military forces other than the regulars and their reserves, and of the administration of those forces when so reorganized, and for such other purposes as are

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

mentioned in the Act, an association may be established for any county in the United Kingdom, with such powers and duties in connection with the purposes aforesaid as may be conferred on it by or under the Act. Associations are to be constituted, and the members thereof are to be appointed and to hold office in accordance with schemes to be made by the Army Council. Every such scheme is to provide for the date of the establishment of the association, for its incorporation by an appropriate name, with power to hold land for the purposes of the Act without licence in mortmain, and for other matters relating to the association.

By s. 2 of the Act it is the duty of an association when constituted to make itself acquainted with and conform to the plan of the Army Council for the organization of the Territorial Force within the county, to ascertain the military resources of the county, and to render advice and assistance to the Army Council; and an association is to have and discharge such powers and duties connected with the organization and administration of His Majesty's military forces as may for the time being be transferred or assigned to it by order of His Majesty signified under the hand of a Secretary of State, or, subject thereto, by regulations under the Act. The powers and duties so transferred or assigned may include any powers conferred on or vested in His Majesty, and any powers or duties conferred or imposed on the Army Council or a Secretary of State, and in particular respecting the organization of the units of the Territorial Force and their administration, including maintenance, recruiting for the force, the provision and maintenance of rifle ranges, and other matters.

By s. 3 of the Act the Army Council shall pay to an association, out of money voted by Parliament for army services, such sums as, in the opinion of the Army Council, are required to meet the necessary expenditure connected with the exercise and discharge by the association of its powers and duties.

By s. 4 the Army Council may make regulations for carrying into effect Part I., consisting of ss. 1—5, of the Act, which deals with county associations, and may by those regulations, amongst other things, provide for authorizing and regulating the

acquisition by or on behalf of an association of land for the purposes of the Act and the disposal of any land so acquired.

Part II. of the Act, commencing with s. 6, deals with the Territorial Force. By s. 6 His Majesty is empowered to raise and maintain a force, to be called the "Territorial Force," consisting of such number of men as may from time to time be provided by Parliament.

By s. 7 His Majesty is empowered, by order signified under the hand of a Secretary of State, to make orders with respect to the government, discipline, and pay and allowances of, and all other matters and things relating to, the Territorial Force. The said orders may provide for, among other things, the constitution of a permanent staff, including adjutants and staff sergeants, who shall, except in special circumstances, be members of His Majesty's regular forces.

In pursuance of s. 7 of the Act the following among a number of other regulations were made as orders by His late Majesty King Edward VII. (1):—

No. 364. "The allowances of instructors serving on army engagement will be governed by the Allowance Regulations, but lodging allowance will not be admissible for non-commissioned officers of the permanent staff who are in occupation of quarters owned or rented by county associations . . . . ."

No. 627. "Expenditure in connection with the provision of such land and buildings, including ranges, as the Army Council consider necessary for the proper discharge of the functions of an association, will be met by grants from army funds. In cases where the acquisition on lease, or other agreement, of property as drill halls, headquarters of units, association offices, gun sheds, ranges, riding schools, &c., has been sanctioned by the Army Council, the grants will be based on the actual net cost of rent. Where property is held by an association, subject to mortgage or loan, the grant will cover the payment of interest and repayment of principal."

No. 633. "All proposals to acquire land, to purchase, erect,

(1) These regulations were provisional only. They have been superseded by others issued in 1910. The corresponding regulations in the new issue are those numbered 561, 763, and 767.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

enlarge or alter buildings, to take premises on lease, feu or agreement, and all proposals to raise loans, whether from the Public Works Loan Commissioners or from private sources, for the purpose of meeting the capital cost of land, new buildings, &c., must be referred for the prior sanction of the Army Council."

In the case of *Wixon* v. *Thomas* the special case stated by the justices was as follows:—

On September 15, 1909, an information was laid against the appellant by the respondent as assistant overseer of the poor of the parish of Prittlewell, and a summons was preferred against him for the recovery of 2*l.* 8*s.* claimed to be due from him under a poor rate made for the said parish on May 4, 1909, in respect of premises alleged to be occupied by him and described in the rate-book as follows:

No.	Name of occupier.	Name of owner.	Description of property.	Name or situation of property.	Gross estimated rental. £ s. d.	Rateable value. £ s. d.	Rate at 2s. in the £. £ s. d.
4791	Wixon, William.	Allen, E.	House.	10, Christ Church Road.	30 0 0	24 0 0	2 8 0

for which rate lawful demand had been made upon the appellant but which he had neglected to pay. On October 19, 1909, the justices, after hearing evidence, held that the appellant was liable to pay the said rate and that the respondent was entitled to the issue of a distress warrant against the appellant for the rate.

At the hearing the following facts were proved or admitted:—

1. The appellant is a squadron sergeant-major in the 18th (the Queen's) Lancers, and at the date of the rate was acting as sergeant instructor to the 2nd squadron of the Essex Yeomanry (a unit of the Territorial Force created under the Territorial and Reserve Forces Act, 1907) and was quartered at Southend-on-Sea for the purpose of discharging his duties in connection with the Territorial Force. The premises in respect of which the rate in question was made upon the appellant were hired by the county association of Essex (being a county association formed under Part I. of the Territorial and Reserve Forces Act, 1907)

for the purpose for which they were used with the sanction of the Army Council.

2. An order signified under the hand of a Secretary of State made by His Majesty under s. 7 of the Territorial and Reserve Forces Act, 1907, and regulations 364, 627, and 633 of the regulations put in force by such order were particularly referred to at the hearing.

3. The formal making and publication of the rate was duly proved and also the demand from and non-payment by the appellant, and the respondent proved to the justices' satisfaction that the appellant lived with his family on the premises in respect of which he was rated.

4. It was proved that the premises in question differed in no way from an ordinary dwelling-house and formed one of a continuous row of private houses. It comprised six rooms, a bath room, kitchen, and scullery.

5. The appellant by his engagement in the Regular Army was entitled to quarters, or allowance in lieu of quarters, if not provided. The premises being provided by the county association, he received no allowance in lieu thereof, but he received under the regulations certain allowances for fuel and light and in respect of furniture provided by him. It was compulsory for him to reside in the house provided for him, but he was liable to be shifted and the premises were liable to military inspection. Of the eight rooms one was used as an office and two were used for stores. Subject to the incidents above stated the premises were used by the appellant for residential purposes as a private individual.

6. The rent was paid by the county association out of money provided by the Army Council.

7. Counsel for the appellant contended:—

(*a*) That the appellant, though living on the premises, was not the occupier for rating purposes.

(*b*) That the appellant was not in occupation of the rooms used as an office and as stores as above mentioned, and that this rendered the rate, which the rate-book shewed to be on the whole house, bad.

(*c*) That the premises were either through the appellant or

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

through the county association occupied for the purposes of the Crown within the principle of the various decisions on the point.

(*d*) That even if the accommodation were in excess of what was reasonably necessary for the appellant and his family (which he contended was not the case) the rate would still be bad on the ground that it ought to be confined to the excess, whereas the rate-book shewed the rate to be on the whole house.

8. Counsel for the respondent contended:—

(*a*) That there being a valid rate, and the appellant being in actual occupation, and the premises in respect of which he was rated being capable of beneficial occupation, the distress warrant must issue.

(*b*) That it is not within the province of the justices on an application for a distress warrant to entertain or inquire into the question of exemption or partial exemption, excess accommodation, or the mode or amount of assessments. That all these were matters of appeal.

9. The justices held (1.) that on an application for a distress warrant they had no jurisdiction to inquire into the questions of excess accommodation, the amount of the assessment, or the mode by which it had been arrived at, or whether the exemption of the Crown attached.

(2.) That the justices had nevertheless jurisdiction and were bound to inquire whether the premises were in fact and in law in the occupation of the appellant or in the constructive occupation of the Crown.

(3.) That the premises were not in the constructive occupation of the Crown, but in the occupation of the appellant.

(4.) That the respondent was entitled to the issue of a distress warrant against the appellant for the rate claimed.

The question for the opinion of the Court was whether the justices' decision was correct in point of law that the warrant must issue.

In the case of *Lambert* v. *Thomas* the facts did not materially differ from those stated above.

In the case of *Burrows* v. *Thomas* the house in question, like the houses in the other two cases, differed in no way from an ordinary dwelling-house and formed one of a continuous row

of private houses. The house in this case comprised one sitting room, a kitchen, a scullery, and three bedrooms and provided reasonable accommodation for the appellant, his wife, and three children. The duties of the appellant were not carried out on the premises, but at drill halls in York Road and Leigh Road. No stores were kept at the house in question, which was occupied and used by the appellant for residential purposes only as a private individual. In other respects the facts in this case did not differ materially from those in the other two cases.

Rowlatt, for the appellants. The occupiers of these houses are not rateable in respect of them because they are occupied solely by servants of the Crown for the purposes of the Crown: *Mersey Docks* v. *Cameron* (1); *Greig* v. *University of Edinburgh* (2); *Coomber* v. *Justices of Berks* (3); *Pearson* v. *Assessment Committee of Holborn Union* (4); *Worcestershire County Council* v. *Worcester Union* (5); *Rayner* v. *Drewitt* (6); *Lewis* v. *Durham Union*. (7) In the case of officers in the Army, houses acquired by the Crown for their residences have always been held to be exempt from rateability in so far as they are reasonably necessary for that purpose: *Reg.* v. *Stewart* (8); *Reg.* v. *Stainsby* (9); *Reg.* v. *Breton* (10); *Reg.* v. *Foster*. (11) If the house contains more accommodation than is reasonably necessary for the officer's residence he may be rated as to the excess. But in the present cases there was either no excess as in *Burrows* v. *Thomas*, or, if there was any excess, it was used for the purposes of the Crown.

This is a point which can properly be raised on the application for a distress warrant. All the facts were before the justices admitted and undisputed; nothing but the conclusion of law remained, and that depended upon the effect of a public Act of Parliament. This case, therefore, is an example of the class of objections which Bowen L.J. in *Reg.* v. *Hannam* (12) thought

(1) (1865) 11 H. L. C. 443.
(2) (1868) L. R. 1 H. L. Sc. 348.
(3) (1882) 10 Q. B. D. 267; (1883) 9 App. Cas. 61.
(4) [1893] 1 Q. B. 389.
(5) [1897] 1 Q. B. 480.
(6) (1900) 82 L. T. 718.
(7) (1904) 90 L. T. 383.
(8) (1857) 8 E. & B. 360.
(9) (1857) 8 E. & B. 370.
(10) (1857) 8 E. & B. 375.
(11) (1857) 8 E. & B. 380.
(12) (1886) 34 W. R. 355.

BIBL. LONDIN. UNIV.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

might properly be raised, and which this Court in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (1) held to be properly raised by a proceeding of this kind.

F. Hinde (*Hohler, K.C.*, with him), for the respondent. This is not a point which can be raised on an application for a distress warrant: *Churchwardens of Birmingham* v. *Shaw.* (2) It was there held that a person exempt from poor rate as the occupier of premises belonging to a scientific or literary society must, if assessed for such premises, contest the liability by appeal. The only objections which can be entertained by a magistrate on an application for a distress warrant are (i.) that the property is not in the parish; (ii.) that the party rated is not the occupier; and (iii.) that the rate is bad on the face of it: *Bates* v. *Plumstead Overseers* (3); at any rate an objection to be raised on an application for a warrant must be one of the class described in that case: *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply.* (4) There is no distinction in principle between the objection that the property in question belongs to a literary or scientific society and the objection that it belongs to the Crown. If the one objection must be raised by appeal, so must the other. Once it appears that a person is in apparent occupation of property in the parish and that the rate is good on the face of it, his only means of escape is by way of appeal. The question for what purpose the property is occupied, whether for purposes of the Crown or for any other purposes, cannot be raised on an application for a distress warrant. The exemption which property of the Crown enjoys does not apply to ordinary houses used merely as residences for officers of the Crown. In order to be exempt the residences must be within the precincts of some property already owned by the Crown: *Gambier* v. *Overseers of Lydford* (5), a case where the residence of a chaplain and a medical officer of a prison, and *Martin* v. *Assessment Committee of West Derby* (6), where that of a superintendent of police, came in question. It was held that the residences not being respectively within the precincts of the prison in the

(1) [1909] 1 K. B. 860.
(2) (1849) 10 Q. B. 868.
(3) (1895) 64 L. J. (M.C.) 127.
(4) [1902] 2 K. B. 125.
(5) (1854) 3 E. & B. 346.
(6) (1883) 11 Q. B. D. 145.

earlier case, or within those of the police station in the latter case, were not exempt. *McHarg* v. *Assessment Committee of Stoke-upon-Trent* (1) and *Showers* v. *Assessment Committee of Chelmsford Union* (2) are to the same effect.

Rowlatt in reply. The cases relating to residences of police and prison officials are really not in point. Property in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the poor for this reason, because the Crown is not named in the Poor Relief Act, 1601 (43 Eliz. c. 2), and is not bound by statute when not expressly named: *Greig* v. *University of Edinburgh* (3); *Coomber* v. *Justices of Berks.* (4) The exemption is therefore strictly in favour of the Crown and the servants of the Crown. Neither the police authorities nor the prison authorities are servants of the Crown. "In these latter cases," said Blackburn J., delivering the opinion of the majority of the judges in *Mersey Docks* v. *Cameron* (5), "it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the Constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu." This passage is cited with approval in the Court of Appeal and the House of Lords in *Coomber* v. *Justices of Berkshire.* (6) The cases of police and prison officials do to a certain extent follow the analogy of the cases of servants of the Crown strictly so called, but not to the full extent. An arbitrary distinction has in those cases been drawn according as the hereditament in question is within or without the prison or police station as the case may be. But that distinction has no place in a case like the present where the Crown and its actual servants are concerned.

(1) (1884) 48 J. P. 775.
(2) [1891] 1 Q. B. 339.
(3) L. R. 1 H. L. Sc. 348.
(4) 9 App. Cas. 61.
(5) 11 H. L. C. 443, at p. 465.
(6) 10 Q. B. D. 267; 9 App Cas. 61.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

The county association incorporated and empowered to take land for the purposes of the Crown acquired these premises, which thereupon became impressed with the character of Crown property. The association had no power to acquire it for any purposes other than those of the Crown.

LORD ALVERSTONE C.J. This case involves a question of great difficulty and one which I should be glad to see raised in some proceeding which would enable it to be taken for final decision to the Court of Appeal. It is impossible to reconcile all the cases in the long chain of authority on any logical principle which would explain why each particular case should fall on one side or the other of the dividing line.

In the first place Mr. Hinde for the respondent contends on the authority of *Churchwardens of Birmingham* v. *Shaw* (1) that the point raised by Mr. Rowlatt is not one which the justices could take into consideration; that the house being to all appearances an ordinary house and the man being de facto in occupation of it, the fact that it is used for some special purpose is a point which must be raised by appeal and not by way of answer to an application for a distress warrant. After many years' experience of these cases I think that I cannot do better than refer to the judgment of Bowen L.J. in *Reg.* v. *Hannam* (2), a case which I cited and on which I based my judgment in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3) It is impossible to formulate a rule by reference to which every conceivable case can at once be solved, but a rule which will solve a large number of cases can be laid down, and I would endeavour to formulate it thus: If on the admitted and undisputed facts before the justices it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought never to have been inserted in the rate-book, the justices are not bound to issue a distress warrant, the overseers in such a case having acted without jurisdiction. But if some fact has yet to be determined before it can be said that the name of the person rated or the property ought not to have been inserted in the rate-book, the

(1) 10 Q. B. 868. (2) 34 W. R. 355.
(3) [1909] 1 K. B. 860.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

Lord Alverstone C.J.

question must then be determined on an appeal, and not on an application for a distress warrant. It is impossible at the present day to apply in all its strictness the old rule that justices are not entitled to entertain on an application for a warrant any matter which might be raised on an appeal. (1) The cases of *Churchwardens of Birmingham* v. *Shaw* (2), *Sheffield Waterworks Co.* v. *Sheffield Corporation* (3), *Reg.* v. *Hannam* (4), and *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (5) all point to this, that the ambit of matters which the justices may consider on an application for a distress warrant has been enlarged, and now, if on the admitted or undisputed facts either the premises in question or the name of the alleged occupier ought not to appear in the rate-book, that point may be taken in answer to an application for a warrant.

What then are the admitted facts in this case? In the outward appearance of these houses there was nothing special; they were houses which might be occupied by persons of any profession or calling. Two of them were in part used for other purposes of the Territorial Force, that is to say, rooms were used for offices and store rooms. In the case of the third house there was no such user, but the whole of the house was used for residential purposes alone. It might be argued that this ought to lead to a different conclusion in the case of the third house, but I should be sorry to make a distinction between the cases on such a ground as that, and I prefer to adopt a broader view, even if that should involve an extension of jurisdiction on the part of the magistrates. All three houses were taken by the association under the powers they derive from the Act of 1907. Here it becomes material to consider those sections of the Act to which our attention has been called, in order to understand the position and powers of the county associations. [The Lord Chief Justice stated the effect of ss. 1—4 and s. 7 as above set out, and continued:—] These associations, therefore, are corporations having power to hold land and charged with such powers and duties connected with the organization and administration of

(1) See *Rex* v. *Trecothick*, (1834) 2 Ad. & E. 405.
(2) 10 Q. B. 868.
(3) (1885) 55 L. J. (M.C.) 40.
(4) 34 W. R. 355.
(5) [1909] 1 K. B. 860.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

Lord Alverstone C.J.

His Majesty's military forces as may be assigned to them by order or by regulations, and particularly respecting the organization and administration of the Territorial Force. The funds necessary for the discharge by the associations of their powers and duties are paid by the Army Council out of money voted by Parliament for army services, and the Army Council make regulations for authorizing and regulating the acquisition by an association of land for the purposes of the Act. These provisions point to an association dealing locally with this branch of His Majesty's military forces known as the Territorial Force. Then finally His Majesty may by order provide for the constitution of a permanent staff, including adjutants and staff sergeants, who shall, except in special circumstances, be members of His Majesty's regular forces. The regulations to which we have been referred, Nos. 364, 627, and 633, do no carry the matter any further.

We have then a very special state of things created in connection with the Territorial Force. Instead of the Army Council making agreements for tenancy itself (in which case there could not have been any doubt that the tenements so taken would have been taken for the purposes of the Crown), it has entrusted this branch of its duty to these new associations, and any expenditure in connection with the provision of such land and buildings as the Army Council consider necessary is met by grants from army funds. Under the Volunteer Acts expenses were borne partly by voluntary subscriptions, but now all the cost of the Territorial Force is met out of money voted by Parliament. It was held in *Pearson* v. *Assessment Committee of Holborn Union* (1) that premises occupied by the commanding officer of a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for that service, were exempt from rates as being occupied by a servant of the Crown for the purposes of the Crown. In my opinion no distinction in this respect can properly be drawn between the Volunteer Forces and the Territorial Force, and in my view the justices ought on the admitted and undisputed facts in the present cases to have come to the conclusion that these were

(1) [1893] 1 Q. B. 389.

lands taken and used for Crown purposes. I do not say how the matter would have stood if there had been a beneficial user for purposes other than those of the Crown. In this case suitable premises, not found to be in any way larger than necessary, were acquired by a county association intended for the occupation of, and occupied by, an officer in the Regular Army discharging duties in connection with the Territorial Force, and so long as a house so acquired continues to be so used it is used for Crown purposes and is exempt from rating.

Mr. Hinde contended that the present case was analogous to the cases in which the quarters occupied by police officers came in question, for example *Martin* v. *Assessment Committee of West Derby* (1), where it was held that a superintendent of police was rateable in respect of a house used solely as a residence for himself and his family, a house which had been rented for him by the county authority and the rent for which was paid out of the police rates and deducted from his salary; and other cases were cited in which it was held that cottages in which police constables are compelled to live, and in which they actually live, are not exempt from rateability. Cases were also cited of houses occupied by prison officers, those inside the prison buildings being exempt while those outside are rateable. In *Cross* v. *West Derby Union* (2), which was not cited during the argument, a superintendent of police was held to be exempt who resided in a house which had one door opening into the street and also had direct access to a police station. But the present case is much stronger in favour of exemption in that these houses were acquired for army purposes by an association established and incorporated for that purpose by Act of Parliament, and supplied with the means of acquiring such property out of funds voted by Parliament for army services; and in my view this case falls within the principle laid down by the House of Lords in *Coomber* v. *Justices of Berks* (3) and by the judgment of Baggallay L.J. in the Court of Appeal in the same case. (4) It is said that no part of the duties of the sergeant instructors was carried on in these houses; that they were used merely as residences; and

(1) 11 Q. B. D. 145.
(2) (1899) 16 Times L. R. 120.
(3) 9 App. Cas. 61.
(4) 10 Q. B. D. 267.

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

Lord Alverstone C.J.

indeed it is expressly stated in one of the cases (*Burrows* v. *Thomas*) that the duties were carried out in drill halls and not in the house in question; but my judgment does not rest on such slight foundations as to be affected by fine distinctions of this kind. If I thought houses used for residences of servants of the Crown were not exempt from rateability as not being used for the purposes of the Crown, I should not hold such houses to be exempt merely because those servants of the Crown carried out their duties, in one case in two rooms, and in another case in three rooms, of the houses they respectively occupied. My judgment rests on broader grounds. I think houses bona fide acquired for the purpose of the Territorial Force under the Act of 1907 are acquired by the Crown for the purposes of the Crown, and as long as an officer in the Regular Army lives in such a house for the purposes of his duty he is exempt from rateability in respect of it. It is not suggested that the presence or absence of a family makes any difference. Therefore, without saying that I can see any very clear line of distinction among the various cases on this point, I think the justices ought to have held that neither the property nor the names of the alleged occupiers ought to have been inserted in the rate-book, and consequently that they were wrong in holding that the respondent was entitled to the issue of a distress warrant against the appellant for the rate claimed.

In this view of the case the question who was the occupier respectively of these houses does not arise, a question which in view of the finding of the justices would have been a difficult one to decide satisfactorily.

PICKFORD J. I agree and have nothing to add.

LORD COLERIDGE J. I am of the same opinion. The difficulty in my mind was as to whether there ought to be proof of some special adaptability of the premises to the purposes of the Crown, either by position or construction or some other convenience which made them specially applicable to those purposes; or, in the absence of such evidence, proof that they were in fact used for the purposes of the Crown. I was in doubt for some time

1910

WIXON v. THOMAS. LAMBERT v. THOMAS. BURROWS v. THOMAS.

whether mere user for the residence of a servant of the Crown was user for the purposes of the Crown. That raised the question whether the residence of a sergeant instructor was part of his duty to the Crown. These doubts have been partly if not wholly resolved by a consideration of s. 3 of the Act of 1907 and of the regulations which have been referred to in this case.

Appeal allowed.

Solicitor for appellants: *The Treasury Solicitor.*

Solicitors for respondent: *Kingsford, Dorman & Co., for W. & F. Gregson, Southend-on-Sea.*

W. H. G.

STEAD *v.* AYKROYD.

1910

Oct. 27.

Betting—Ground used for the Purpose of a Racecourse—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43), *s.* 2.

A field was being used on a particular day for certain mixed sports consisting partly of foot races and other athletic competitions and partly of horse races. The field was not permanently laid out as a racecourse, but was only temporarily adapted for the purpose of horse racing for the particular occasion:—

Held, that it was not "ground used for the purpose of a racecourse for racing with horses" within the meaning of s. 2 of the Street Betting Act, 1906, so as to exclude the application to it of the provisions of that Act.

Case stated by justices of the West Riding.

An information was preferred against the appellant under s. 1 of the Street Betting Act, 1906, charging him with unlawfully loitering in a place called the Sports Field at Kinsley for the purpose of betting.

At the hearing the following facts were proved or admitted. At 4.50 p.m. and afterwards on Whit Monday, May 16, 1910, the appellant was betting on certain horse races held on that day in connection with the Kinsley-Fitzwilliam Hospital Committee's annual athletic sports and horse races in a field known as

1910

STEAD v. AYKROYD.

Mrs. Baum's or Sports Field, Kinsley, in the county of York. The programme of events included two horse races. The other events, ten in number, consisted of foot races, jumping, and other athletic competitions. Persons were admitted into the field, which is enclosed, on payment of an admission fee. At the entrance to the field was conspicuously exhibited by the person or persons having the control of it a notice prohibiting betting therein. The field is not registered as a racecourse and is not permanently laid out or used as a racecourse, but is adapted for the occasion of the said annual sports and horse races. The justices convicted the appellant subject to a case.

The question for the opinion of the Court was whether the premises so used for the purposes of the said sports and horse races were "ground used for the purpose of a racecourse for racing with horses or adjacent thereto" within the meaning of s. 2 of the said Act. (1)

Hollis Walker, for the appellant. The field in question was being used for the purpose of a racecourse on the day on which the appellant was found betting there. The exemption which is conferred by s. 2 attaches not to the permanent character of the ground, but to the use to which it is put "on the days on which races take place." It was not the less used for horse racing because races of another kind took place there on the same day.

[PICKFORD J. If you are right every piece of ground on which a horse race takes place is within the exemption.]

Yes, if a definite track is marked out with posts or flags for the purpose. The justices seem to have laid stress upon the fact

(1) By the Street Betting Act, 1906, s. 1, sub-s. 1, "Any person frequenting or loitering in streets or public places . . . . for the purpose of . . . . betting" shall be liable to a penalty.

Sub-s. 4: "For the purpose of this section . . . . the words 'public place' shall include . . . . every enclosed place . . . . to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein."

Sect. 2: "Nothing contained in this Act shall apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place."

that the field was not registered as a racecourse. But no registration is required by law.

Scholefield, for the respondent, was not called upon.

LORD ALVERSTONE C.J. Whether this field was being used for the purpose of a racecourse for racing with horses seems to me to be a question of fact, and I do not think we are entitled to say as matter of law that the justices were bound upon the evidence to hold that it was being so used. The programme describes the meeting as the hospital committee's annual athletic sports and horse races, and the events consisted of a number of foot races and other competitions with a couple of horse races thrown in. It was contended that under those circumstances the appellant was entitled to bet there. But I think that to hold that because the programme included two horse races the place was being used for the purpose of a racecourse would be putting a construction on the language of s. 2 not intended by the Legislature. The appeal must be dismissed.

PICKFORD and LORD COLERIDGE JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *Knowles Stanbury, for R. A. Young, Nottingham.*

Solicitor for respondent: *Clements Williams, for Vibart & Dixon, Wakefield.*

J. F. C.

1910

Oct. 27.

WANDSWORTH BOROUGH COUNCIL *v.* GOLDS.

Metropolis—New Street—Paving Expenses—Alteration of Width of Carriageway and Footpath—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

The council of a metropolitan borough, when proposing, in the exercise of the powers conferred by s. 105 of the Metropolis Management Act, 1855, to pave an old road which has become a new street, have no power to alter the respective widths of the carriageway and footpaths, so as to cast upon the frontagers the expense of throwing portions of the footpaths into the carriageway.

Case stated by a metropolitan police magistrate.

The appellants preferred a complaint against the respondent whereby they claimed from him 563*l.* 11*s.* 4*d.* as being his proportion of the estimated expenses of paving a new street called Cavendish Road.

At the hearing the following facts were proved or admitted. The road known as Cavendish Road was an old parish road, and until 1885 was bounded almost entirely by open land on both sides. The land on the north-eastern side was occupied by a house and grounds known as The Clock House, and on the south-western side by another house and grounds known as Cavendish House. At that time Cavendish Road was a fairly good flint road, the subsoil being clay. In the year 1885 The Clock House was sold and the site was developed as a building estate, and a number of houses were built. The south-western side remained unbuilt on till 1908, when Cavendish House was pulled down and its site began to be built on. Until 1885 the roadway of Cavendish Road was from time to time repaired with flints by the Wandsworth Board of Works and kept in good condition as a flint road. There were gravel footpaths at the sides of the road, and these were from time to time occasionally repaired. After 1885 the traffic considerably increased, and the roadway consequently required more frequent repairs. Down to 1902 the roadway was always repaired with flint, which is more economical than granite where the traffic is not heavy. In 1902 the roadway or a portion of it was repaired

with granite, and it was again similarly repaired with granite in 1905 and 1908. These repairs were done by the direction of the borough surveyor in the ordinary course of his duty at the expense of the borough council and were not the subject of any special resolution or direction by the appellants. In July, 1909, the condition of the road was as follows. Its total width, including the footpaths, was about 60 ft. Upon the clay subsoil there was on the roadway a stratum of about 12 in. or 14 in. of flints. Over the flints was a top layer of granite varying in thickness from almost nothing to 2½ in. The foundation of the roadway was sound and hard, but the surface was in bad condition. There was little or no camber, the middle of the road being practically on the same level as the sides. The roadway was not channelled. There were some gullies in it for the purpose of carrying off the surface water to the sewer. The footpath on the north-eastern side varied in width from 9 ft. 7 in. to 20 ft. This was a gravel path which had been coated with siftings and rolled with a hand roller, and had a rough York stone edging along most of its outer edge, but had no kerbing. On the south-western side there was a similar footpath varying in width from 19 ft. to 21 ft., but on this side there was only a very short length of York stone edging. In July, 1909, the appellants, purporting to act under s. 105 of the Metropolis Management Act, 1855, passed a resolution that the portion of Cavendish Road in question was not paved to their satisfaction and that it should be so paved throughout the whole breadth of the carriageway and footpaths. The paving was estimated to cost 2319*l.* 15*s.* 10*d.*, of which 931*l.* 1*s.* 6*d.* was in respect of the roadway, 1072*l.* 6*s.* 10*d.* was in respect of the footpaths, 175*l.* in respect of incidental costs and charges, and 141*l.* 7*s.* 6*d.* in respect of manholes and gullies. By the apportionment the appellants duly apportioned the said expenses between the owners of the premises bounding or abutting on the said portion of Cavendish Road, and the share of the respondent was 563*l.* 11*s.* 4*d.* The works comprised in the resolution included: (*a*) The throwing of part of the footpaths into the road, and part of the roadway into the narrower footpath, so as to make the footpaths on each side of the road of

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

a uniform width of 15 ft. (*b*) The making up such footpaths by putting down along the outer edge a granite kerb 1 ft. wide, and along the inner side next to the forecourts of the houses artificial stone paving 8 ft. wide, leaving a width of 6 ft. of gravel surface between the pavement and the kerbing. (*c*) The putting in a proper foundation of hard core to so much of the new roadway as was formerly pathway. (*d*) The addition of the material necessary to bring the surface of the roadway to a proper camber, and forming the roadway to an extra height of 9 in. to 11 in. in the centre. This would be essential to a proper making up of the road. (*e*) The covering of the surface with 3 in. of granite. (*f*) The channelling of the roadway on both sides with Queensferry setts. (*g*) The putting in additional gullies, i.e., gully traps and drains, and the alteration of existing gullies at an expense of about 137*l.* 7*s.* 6*d.* These gullies were for the purpose of carrying the rainwater which collects in the channels away into the sewers, and additional gullies were required because after the proposed work had been done the road would not absorb so much of the surface water, and the surface water would run off into the channels more quickly. (*h*) The putting in of manhole covers at an expense of about 4*l.*

The respondent admitted his liability to pay all the proper costs of and in connection with the making up of the existing footways, but contended that he was not liable to bear any part of the cost of making up the roadway, inasmuch as it had prior to and since the passing of the Metropolis Management Act, 1855, been treated and dealt with by the appellants and their predecessors as a roadway under their sole control and management as to all repairs, and was in fact, owing to the extensive and permanent character of the repairs, of the same character as to repair as the roads taken over and dealt with by the appellants and their predecessors under the provisions of the said Act. He further contended that the frontagers were not liable for the expense of the reconstitution and making up of the roadway for the purpose of making the footways of a uniform width of 15 ft.; and that the charges for gullies and manhole covers did not form any part of the expense of paving the street and were therefore not chargeable against the frontagers.

The magistrate found:—

1. That this part of Cavendish Road became a new street for the purpose of s. 105 in the year 1908, when the houses were erected along its south-western side, and that the proposed cost of paving the paths was properly cast upon the owners.

2. That there was evidence before him on which he was entitled to find that the constitution of the road apart from the paths was such as to be within the principle of *St. Giles, Camberwell* v. *Hunt.* (1)

3. That, even in the event of his being right in so finding that the road was within the principle of that case, the cost of channelling the sides of the road was properly charged to the owners.

4. That gully traps, gullies, and subterranean drains and manhole covers are not "paving" within s. 105, and the cost should not be charged upon the owners.

He accordingly dismissed the complaint subject to a case for the opinion of the Court.

C. A. Russell, K.C., and *Daldy*, for the appellants. The magistrate was wrong in holding that the principle of *St. Giles, Camberwell* v. *Hunt* (1) applied to the facts before him. That case was only an application of the recognized rule that, if the local authority have once put in force the powers of s. 105 and have paved a new street under a resolution whereby they were to charge the expense on the frontagers, they cannot at a subsequent date repave the street at the expense of the frontagers. There the vestry, having passed a resolution under s. 105 in 1866, carried the work out some years later, but omitted to demand payment of the expense from the frontagers, and instead charged it on the general rates. In 1886 the vestry passed a further resolution for the repairing of the streets under s. 105. It was held that their powers under that section were exhausted by the first exercise of them none the less because they had by mistake neglected to exact payment from the persons liable. But that case does not touch the present. The granite metalling of Cavendish Road between 1902 and 1908 was not done under

(1) (1887) 56 L. J. (M.C.) 65.

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

any resolution by the borough council or their predecessors, but by the borough surveyor as an ordinary repair. The powers, therefore, of s. 105 had never been exercised at all before 1909, and the resolution passed in that year was not ultra vires. Secondly, the magistrate was wrong in holding that the gullies, gully traps, and manhole covers were not part of the paving of the road. The expression "pave" in s. 105 of the Act of 1855 is enlarged by s. 112 of the Metropolis Management Act, 1862, to "include the formation of the roadway or footway of any street." The gullies, &c., are part at all events of the formation of the road. It is admitted, however, that if the appellants are wrong on this point they must fail, as the inclusion of an improper subject in the estimate makes the apportionment bad altogether.

Danckwerts, K.C., and *Courthope Munroe*, for the respondent. It is conceded that the case is not within the principle of *St. Giles, Camberwell* v. *Hunt.* (1) But the resolution was bad upon another ground, that it purported, in order to make the footpaths of a uniform width of 15 ft., to throw several feet of the footpaths into the roadway, and small portions of the roadway into one of the footpaths, and that the local authority cannot do. In *Robertson* v. *Bristol Corporation* (2) it was held by the Court of Appeal that an urban authority, when paving and making good a street under s. 150 of the Public Health Act, 1875, has no power to alter the respective widths of the carriageway and footway of the street, because it must for the purposes of that section take the dedication of the way as it finds it, and cannot alter or enlarge that dedication so as to cast a greater burden upon the frontagers. That section corresponds with s. 105 of the Act of 1855, and the above decision is an authority equally under s. 105. Here there was stone edging along the side of the existing footpaths, from which fact it must be assumed that the original dedication of the footway was of the width found at the date of the resolution. It is true that the appellants might have altered the respective widths of roadway and footway under s. 52 of Michael Angelo Taylor's Act, 57 Geo. 3, c. xxix. :

(1) 56 L. J. (M.C.) 65. (2) [1900] 2 Q. B. 198.

Corsellis v. *London County Council* (1); but they did not act under that section. Secondly, the resolution was bad as including the provision of gullies, gully traps, and manholes. They are no part either of the paving or of the formation of the road, but part of the drainage system.

Russell, K.C., in reply. *Robertson* v. *Bristol Corporation* (2) is not an authority upon s. 105. That section and s. 150 of the Public Health Act apply to different subjects, for whereas the latter section is confined to highways not repairable by the inhabitants at large, the former applies to highways which are so repairable. Further, that case only applies where there is evidence that the proposed alteration of the widths of roadway and footway would alter the dedication. In the absence of evidence to the contrary, the presumption is that the original dedication was of the whole width between the hedges for use by the public for all purposes, riding, driving, or walking. The existence of a gravelled footpath with a stone edging is not sufficient to rebut that presumption.

LORD ALVERSTONE C.J. If the main point on which the magistrate decided this case is right, namely, that when once a local authority have done work in the nature of permanent paving to a road their right to exercise the powers of s. 105 is gone, the case would be one of very general application. The magistrate seems to have thought that the case of *St. Giles, Camberwell* v. *Hunt* (3) was an authority for that proposition. But if we turn to that case we find that it establishes nothing more than that where the local authority have purported to act under s. 105, and have elected what works they will require to be done in order to cause the road to be well and sufficiently paved, and have had those works done, they cannot afterwards call upon the owners to do more. That is a principle which has been recognized in more than one subsequent case. But here the metalling of the road that was done prior to 1908 was not done under s. 105 at all, for until that date the road was not a new street. It was in the nature of ordinary repairs to the

(1) [1908] 1 Ch. 13. (2) [1900] 2 Q. B. 198.
(3) 56 L. J. (M.C.) 65.

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

Lord Alverstone C.J.

surface of the road. In my opinion, therefore, the ground upon which the magistrate proceeded was wrong. I can see nothing on the facts before him to deprive the borough council of their power to act under s. 105.

With regard to the channelling I should have thought that that was a point which did not admit of serious argument. In my opinion making channels by the side of the road, possibly of shaped stone or wood, was so clearly part of the paving that it could not be ultra vires of the council under s. 105 to include channelling under that head.

I now come to the two points upon which Mr. Danckwerts relied. The first was that the council were not entitled to charge the respondent with the extra expense of paving caused by the rearrangement of the surface between the footpaths and the roadway. The council contend that if in a road, which has become a new street, there have for many years been footpaths of defined but varying width, and a roadway of a defined but varying width, they can under this section require the frontagers to pay the expense of straightening the lines of the footpaths and roadway and of bringing the roadway to what they consider a proper width, and for that purpose throwing part of the footways into the roadway. I wish it to be distinctly understood that I am not dealing with a case in which all that is proposed to be done is to straighten the line of the footpaths and roadway without altering their average width. I should be very unwilling to say that the authority might not under s. 105 straighten a waving line provided that they did not substantially affect the width of the roadway and footpaths respectively. But that is not this case. It is proposed to throw several feet of the footpaths into the roadway; and that I am of opinion cannot be done. There is express authority of the Court of Appeal in *Robertson* v. *Bristol Corporation* (1) under the corresponding section of the Public Health Act, 1875, s. 150, that an urban authority when making up a street have no power to alter the respective widths of the carriageway and footway. It is said that the principle of that case does not apply where the relative proportions of carriageway and footway have not been

(1) [1900] 2 Q. B. 198.

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

Lord Alverstone C.J.

determined by the owner of the soil; and if it were open to the council to say that there was no evidence here that a particular part of the street had been dedicated as a roadway and a particular part as a footpath, there would in my opinion be a good deal to say for that contention. But the facts do not support it. The footpaths were made of different material from the roadway, being made of hand-rolled gravel, and they had a stone edging separating them from the roadway, beyond which edging were gullies. It is obvious that the gullies would be put, not in the middle of the road, but between the footpaths and the roadway. Under those circumstances we cannot assume that there was a dedication of the whole width between the fences as a carriageway. The principle of *Robertson* v. *Bristol Corporation* (1), though decided under a different Act, applies equally to the exercise of the powers given by s. 105 of the Act of 1855, and we are prevented by the authority of that case from saying that a metropolitan borough council have, under powers of paving and forming the road, any power to impose on the frontagers the expense of turning a footpath into a carriage road. But then it was said by Mr. Russell that the council had power to do it under Michael Angelo Taylor's Act. The answer is that even if they had they have not proceeded under the powers of that Act. The second point relied on by Mr. Danckwerts was that the expense of providing the gullies which formed part of the system of subterranean drainage did not come under the head of paving or forming the road, and consequently was not properly chargeable to the owners. Speaking for myself, I should have great difficulty in coming to the conclusion that the construction of a gully, that is to say of the connection of the channel with the sewer, is part either of the paving or the formation of the road. The paving of the road is one thing. The making of improved drainage to take away water which will require to be taken away more rapidly in consequence of that paving is another. It is not necessary for the decision of this case that I should decide the point, but my opinion inclines in favour of the respondent. For the reasons which I have given I think the decision of the magistrate must be affirmed.

(1) [1900] 2 Q. B. 198.

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

PICKFORD J. I agree that the magistrate was wrong in considering that the case fell within the principle of *St. Giles, Camberwell* v. *Hunt* (1); but I think his decision can be and ought to be supported upon the ground that the estimate on which the apportionment was based contains elements which were beyond the jurisdiction of the person making it. That estimate included the expense of reducing the footpaths, which on one side varied from 9 ft. 7 in. to 20 ft. and on the other side varied from 19 ft. to 21 ft., to a uniform width of 15 ft., and of throwing the portions so taken away from the footpaths into the roadway. According to the decision in *Robertson* v. *Bristol Corporation* (2) a local authority has not the power to charge frontagers with the expenses of an operation of that kind under s. 150 of the Public Health Act, 1875. The question is whether that authority is applicable to this case. Is there any difference for the purposes of this case between that section and s. 105 of the Act with which we are dealing? Mr. Russell suggested that the latter section is applicable to highways which are repairable by the inhabitants at large, whereas the former section is not. But I am quite unable to see that that makes any difference at all. Mr. Russell then argued that that decision did not apply here, because it depended upon the principle that you cannot alter the dedication of a way from a carriageway to a footpath or from a footpath to a carriageway; that there was no such alteration here because it must be assumed that the whole space between the fences was originally dedicated as a carriageway; and that the dedication cannot be cut down by the mere fact that footpaths have been made on the sides of the road. If there was any evidence to shew that the whole space was originally dedicated as a carriageway I should agree, but there is no such evidence. The only evidence that we have before us is that a portion of the road was used as a carriageway and a portion as a footpath. If that be so, the only evidence of dedication being the evidence of user, the inference is that the part now called the footpath was originally dedicated as a footpath, for the only evidence of its user is as a footpath. Therefore I do not think that that contention is correct. Then it was said that the decision in *Robertson's Case* (2) does not

(1) 56 L. J. (M.C.) 65. (2) [1900] 2 Q. B. 198.

apply because the word "pave" in s. 105, as extended by s. 112 of the Act of 1862, includes the "formation" of the street, and it is said that the formation of the street must include the rectification of the boundary between the carriageway and the footpath. I do not think the word "formation" is so comprehensive as that. What I think it means is this, that the power of the local authority is not to be confined to mere paving, but is to include all the operations, such as levelling, which are necessary to the making of the road, that is to say the making of the road as it is, and not the making of the road with an alteration of the space devoted to the carriageway and footway respectively. I think that *Robertson* v. *Bristol Corporation* (1) is an authority that the appellants in the present case could not lawfully charge the frontagers with this expense, and that therefore the estimate includes matters which there was no jurisdiction to include in it. It may be that the appellants had power to do this work under Michael Angelo Taylor's Act. It was said that under that Act, though in the first instance they must do it at their own expense, they can afterwards charge that expense on the frontagers. Whether that be so or not, it is not what they have done. With regard to the question of the gullies I express no opinion, as it becomes unnecessary for me to decide it.

Lord Coleridge J. I think it is unnecessary for me to express any opinion except upon one point, because I think that on that point the respondent's contention is fatal to the appeal. Dedication in the absence of positive evidence of the act of dedication is matter of inference and presumption from user. If it had been shewn that at some previous time there was no footpath the presumption would then be that the whole was dedicated to the unrestricted user by the public for all purposes. The fact in this case is that there was at the earliest time of which evidence has been given a defined, differently repaired, and in parts kerbed footpath of varying width on either side of the road. The presumption therefore is that the dedication was in accordance with these facts. If then there was such a limited dedication, the local authority have no right, in altering

(1) [1900] 2 Q. B. 198.

1910

WANDSWORTH BOROUGH COUNCIL v. GOLDS.

Lord Coleridge J.

the relative proportions of footpath and carriageway, to alter the burden cast upon the frontagers under s. 105. In *Robertson* v. *Bristol Corporation* (1) it was held that that could not be done under s. 150 of the Public Health Act, 1875, and as that decision turned, not upon any reasons applicable only to streets in an urban district not repairable by the inhabitants at large, but upon the question whether or not the dedication would be altered by what was proposed to be done, it is in my opinion applicable to this case.

Appeal dismissed.

Solicitor for appellants: *Walter W. Young.*
Solicitors for respondent: *Corsellis & Berney.*

J. F. C.

1910

Oct. 17.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* MORTIMER.

Criminal Law—Betting—User of Premises—Evidence—Receipt of Money—Consideration—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The appellant, a bookmaker, was convicted on an indictment charging him under s. 3 of the Betting Act, 1853, with having used his premises for the purpose of money being received by him "as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter" money on bets on horse races.

Evidence was given on behalf of the prosecution that, at the time alleged in the indictment, postal orders for 5*l.* were sent to and retained by the appellant in pursuance of a letter previously received in which the writer stated that he desired to open a deposit account with the appellant and that his commissions would not exceed 5*l.* without a further remittance; that bets to an amount not exceeding 5*l.* were subsequently made by the appellant with the sender of the postal orders and an account shewing the sums won or lost was sent to him; and that a few days later the appellant's premises were searched by the police, and betting slips and ledgers containing entries relating to the bets were found there:—

Held, that there was evidence on which the jury were entitled to convict the appellant.

APPEAL against conviction.

The appellant was indicted at the Southampton quarter

(1) [1900] 2 Q. B. 198

1910

REX v. MORTIMER.

sessions for an offence under s. 3 of the Betting Act, 1853. (1) The indictment alleged that the appellant on and between January 1 and June 2, 1910, being the occupier of a certain house, 22, East Park Terrace, Southampton, unlawfully did use the house "for the purpose of certain moneys" being received by him and on his behalf "as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter certain moneys upon certain events and contingencies of and relating to horse races against the form of the statute, &c."

Evidence was given on behalf of the prosecution that on May 4, 1910, one Moore, the chief superintendent of the Portsmouth borough police, wrote in the name of one Ellison, an existing person residing at Portsmouth, a letter to the appellant in the following terms:—"Dear Sir,—Your name has been mentioned to me by a friend and on account of my position here I do not wish to communicate with a local bookmaker. I desire to open a deposit account with you and will forward a 5*l.* note. My commissions will not exceed that amount without a further remittance. I enclose card and stamped addressed envelope for reply. Yours truly, J. Ellison." This letter was addressed and sent to the appellant at 22, East Park Terrace. On May 24 Moore received from the appellant a letter addressed to J. Ellison and headed "Telegrams Mortimer Southampton. Bernard Mortimer, 22, East Park Terrace, Southampton, also at Flushing, Holland," which letter was as follows: "Dear Sir,—Herewith book of rules, and on receipt of yours as suggested I will place you on my list of clients. Yours truly, p.p. Bernard Mortimer, J. E. M." On the same day Moore wrote to the

(1) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of . . . . any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race."

Sect. 3: "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them . . . . shall" be liable to certain penalties.

1910

REX v. MORTIMER.

appellant, "Please find enclosed money order for 5*l.* as arranged. I will wire or 'phone commissions each day and look for statement each Monday. Yours truly, J. Ellison. P.S.—P.O.'s enclosed, too late for money order." The postal orders sent in this letter were subsequently paid in to the appellant's banking account. On May 26, 27, and 28 Moore telegraphed to the appellant to make bets with him on horse races taking place on those days, and on May 29 he received from the appellant an account addressed to "J. Ellison," which gave the details of the sums won and lost and shewed that of the 5*l.* there remained a balance in favour of Mr. Ellison of 4*l.*

On June 1, Derby day, the police went to 22, East Park Terrace with a search warrant, and found there, in a room fitted up as an office, 167 betting slips, mostly for small amounts, some of which related to the Derby and other races taking place on that day. The letter of May 24, which enclosed the postal orders, books of account and ledgers containing entries relating to bets, including those made by the appellant for "J. Ellison," and some betting literature were also found on the premises.

The appellant gave evidence. He denied that he had ever done any ready-money betting, and stated that with the exception of the postal orders received on deposit in this case he had never received money at 22, East Park Terrace for the purpose of bets on future races.

The recorder in summing up told the jury that they had only to consider whether or not the appellant used the office at East Park Terrace for the purpose of receiving money beforehand with regard to bets, and, having referred in detail to the evidence for the prosecution as to the letters which had passed and as to the articles found on the premises, he asked the jury to consider what the ledgers were kept for if the appellant was not carrying on a betting business, and whether having heard the appellant's evidence they were satisfied that he was using the premises for the purpose of receiving bets.

The appellant was convicted, the jury stating that they thought the appellant "was very reluctantly led into it in this case."

The appellant was fined 25*l.* and ordered to pay 20*l.* costs.

G. W. Ricketts, for the appellant. First, the postal orders were not received as a consideration for a contract or promise to pay money in respect of bets. The money was received on deposit to be security if bets should, at the request of the sender of the money, subsequently be made; but there was no contract by the sender to make bets, and he could at any time have demanded the return of the deposit. In the words of Lord Herschell in *Universal Stock Exchange* v. *Strachan* (1), the money "was deposited as security against a debt which might arise from a gambling transaction." The fact that bets were subsequently made is immaterial, for the offence must have been committed, if at all, at the time of the receipt of the postal orders.

Secondly, there was no evidence that the appellant used the premises for the purpose of ready-money betting. The fact that betting slips were found there is not evidence of user for illegal betting, for the presence of the betting slips was consistent with the user of the premises for betting on credit only. The only evidence, therefore, which the prosecution can rely on is the one transaction of the receipt of the postal orders; but for the purpose of proving user one isolated transaction is not sufficient: *Reg.* v. *Davies*. (2) There was no evidence that, except on this one occasion, the premises were ever used for the purpose of illegal betting; and the attention of the jury was not properly directed to the question of what was necessary to constitute the offence. The form in which the verdict was given shews that if the jury had been properly directed on the question of user for a particular kind of betting they would most probably have acquitted the appellant.

Thirdly, the indictment, which charged the appellant with receiving moneys, is not satisfied by proof of the receipt of postal orders. It is not disputed that, if a house has been used for an essential part of operations carried on for the purpose of money being received, that is sufficient to justify a conviction under the Betting Act, 1853, although the receipt of the money did not take place at the house: *Lennox* v. *Stoddart* (3); but in order to

(1) [1896] A. C. 166, at p. 173. (2) [1897] 2 Q. B. 199.
(3) [1902] 2 K. B. 21.

1910

REX v. MORTIMER.

give effect to the word "thereafter" in s. 1 the promise to pay must be after the receipt of the money, and in the present case there was no evidence that the alleged contract to make bets was made after the postal orders had been converted into money.

E. B. Charles, for the Crown. The effect of the correspondence between the parties is that, at the date of the receipt of the postal orders by the appellant, there was a definite arrangement that the appellant should make bets to an amount not exceeding 5*l.*, and in pursuance of that arrangement bets were in fact made. That is sufficient to bring the case within the Act. The fact that betting slips were found on the premises, coupled with the receipt of the postal orders, was evidence on which the jury were entitled to find that the appellant was carrying on a ready-money betting business on the premises.

[He was stopped.]

Ricketts in reply.

The judgment of the COURT (Lord Alverstone C.J., Pickford and Lord Coleridge JJ.) was delivered by

LORD ALVERSTONE C.J. In this case the appellant was indicted under s. 3 of the Betting Act, 1853, for unlawfully using a certain house for the purpose of certain moneys being received by him as and for the consideration for certain assurances, undertakings, promises, and agreements to pay thereafter certain moneys upon certain events and contingencies of and relating to horse races. It cannot be said that the attention of the jury was not properly directed by the recorder to the question whether or not the appellant had used the house for the purpose specified in the indictment, for he told the jury that the question which they had to consider was whether or not the appellant used the premises for the purpose of receiving money beforehand with regard to bets. The particular transaction of which evidence was given was the result of a police trap, and though I do not like police traps, any more than any one else, still it is only fair to remember that it is almost impossible to detect this class of offence in any other way. It is always important to bear in mind in these cases that it is only certain kinds of betting that are illegal; but

the Court is of opinion, without any doubt, that this transaction comes within the class of betting which is prohibited by the statute. The letter of May 4 stated that the writer desired to open a deposit account with the appellant and would forward 5*l.*, and that his commissions would not exceed that amount without a further remittance. I understand that to mean that the appellant was to make bets to an amount not exceeding 5*l.* Then the appellant answered that on receipt of the money he would place the writer on his list of clients; and on the same day the money was sent. It is unfortunate that, if the book of rules which was sent by the appellant contains anything which would tell in his favour, it should not have been produced at the trial. The transaction contemplated was that the appellant was to make bets up to the amount of 5*l.* on horses to be named by the sender of the money. But the matter does not stop there, for the appellant kept the money, made bets, and applied a part of the 5*l.* in payment of losses. In these circumstances it appears to us to be impossible to say that there was not a receipt of money within the very wide language of the section "as or for the consideration for any assurance, undertaking, promise, or agreement" to pay on an event relating to a horse race.

It was further contended that there was no evidence that the house was being used in the manner prohibited by the section, because, it is said, only this one instance of a receipt of money was proved. In our opinion there was sufficient evidence on which the jury were entitled to convict the appellant. It was proved or admitted that the appellant was carrying on a betting business of some kind at the premises, and when they were searched by the police a number of betting slips were found there, some of them for very small amounts and relating to races taking place on that very day, and it would be a strong thing to say that the jury were bound to assume that these things related only to credit betting. But in any case we are of opinion that where money is sent to a bookmaker and is retained by him, and bets are made by him for the sender of the money at the address where the money was received, the case cannot be treated as an instance of an isolated transaction which, as was held in

1910

REX v. MORTIMER.

Reg. v. *Davies* (1), is insufficient to prove user; and it is in our opinion impossible to say that there was no evidence on which the jury could find that the appellant was using the house for ready-money betting.

We do not desire to express any final opinion as to whether the postal orders were money within the meaning of the section. I think that there is authority for saying that the receipt of a document which can be converted into money is a receipt of money for the purposes of this Act, but it is not necessary to decide that point, for we are all of opinion that even if it had to be decided in the appellant's favour we should have to deal with the case under s. 4, sub-s. 1, of the Criminal Appeal Act as one in which there had, on this point, been no substantial miscarriage of justice.

Appeal dismissed.

Solicitor for appellant: *H. C. Lamport, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitor for the Crown: *R. R. Linthorne, Town Clerk, Southampton.*

(1) [1897] 2 Q. B. 199.

F. O. R.

[COURT OF CRIMINAL APPEAL.]

1910

Oct. 17, 24.

THE KING *v.* SPRATLING.

Criminal Law—Conviction on Indictment—Conditional Discharge—Recognizance to appear for Sentence—Breach of Condition—Power of Quarter Sessions to sentence—Inherent Jurisdiction—Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *ss.* 1, 6.

The appellant having been convicted of larceny at quarter sessions was discharged conditionally under s. 1, sub-s. 2, of the Probation of Offenders Act, 1907, on his entering into a recognizance, subject to certain conditions authorized in the circumstances by the Act, to appear for sentence when called upon at any time during a specified period. The appellant committed a breach of one of the conditions of the recognizance, and was in consequence called upon to appear before the quarter sessions for sentence. It was contended for the appellant that s. 6, sub-s. 5, of the Act only applied to cases where a defendant had been bound over by a Court of summary jurisdiction under s. 1, sub-s. 1, of the Act to appear for conviction and sentence, and that quarter sessions had, therefore, no power to sentence the appellant. Quarter sessions having stated a case for the opinion of the Court:—

Held, that quarter sessions had power to sentence the appellant, for, assuming, as appeared probable, that there was no power to do so under s. 6, sub-s. 5, Courts of quarter sessions have always had, as part of their inherent jurisdiction, power to order a convicted person to be bound over to come up for judgment when called upon, and that power is unaffected by the Act of 1907.

Case stated by the chairman of the Somerset quarter sessions for the consideration of the Court of Criminal Appeal.

The case was as follows:—The defendant was tried at the quarter sessions of the county of Somerset holden at Wells on October 21, 1908. The indictment charged him with having stolen three live fowls and two packets of seed between the hours of 11 p.m. on Sunday, the 12th, and 8 a.m. on Monday, the 13th July, 1908, the property of John Ashford. The jury found the defendant guilty of the charge laid in the indictment.

The Court, in pursuance of the provisions of 7 Edw. 7, c. 17, s. 1, sub-s. 2 (1), made an order discharging the defendant

(1) Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1:

"(1.) Where any person is charged before a Court of summary jurisdiction with an offence punishable by such Court, and the Court thinks that the charge is proved, but is of opinion that, having regard to

1910

REX
v.
SPRATLING.

conditionally upon his entering into a recognizance in the sum of 20*l.* on conditions set out in a probation order. The conditions

the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to conviction, make an order either

"(i.) dismissing the information or charge; or

"(ii.) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

"(2.) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of opinion," as in sub-s. 1, "the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

Sect. 6: "(1.) If the Court before which an offender is bound by his recognizance under this Act to appear for conviction or sentence, or any Court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension, or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such Court and at such time as may be specified in the summons.

"(2.) The offender, when apprehended, shall, if not brought forthwith before the Court before which he is bound by his recognizance to appear for conviction or sentence, be brought before a Court of summary jurisdiction.

"(3.) The Court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the Court before which he is bound by his recognizance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last-mentioned Court.

"(4.) An offender so remanded to custody may be committed during remand to any prison to which the Court having power to convict or sentence him has power to commit prisoners. In the case of a child or young person under the age of sixteen, he shall, if remanded, be dealt with wherever practicable in accordance with the provisions of section four, sub-section one, of the Youthful Offenders Act, 1901.

"(5.) A Court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict

1910

REX v. SPRATLING.

were (inter alia) that "the offender be of good behaviour and do appear for sentence when called on at any time during the period of two years from October 21, 1908," and that he "do abstain from intoxicating liquor during such period."

On May 11, 1910, an information was sworn by Police constable Giles, and the defendant was brought before the petty sessional court of Wincanton, and was remanded in custody and duly brought before the Court of quarter sessions holden at Taunton on June 29 last. It was then proved that the defendant had been drunk on various occasions in February and May, 1910.

Counsel for the Crown and for the defendant submitted that certain questions of law arose in connection with the power of the Court to deal with the defendant by way of sentence. It was submitted—(1.) That the Court had no power to sentence the defendant under s. 6 of the aforesaid Act, inasmuch as that section gave such power to a Court of summary jurisdiction only. (2.) That the Court had no such power under s. 117 of the Larceny Act, 1861 (24 & 25 Vict. c. 96) (as no other punishment had been inflicted upon him), or otherwise.

The Court decided to postpone judgment until the above questions should have been considered, and it reserved the same for the consideration of the Court of Criminal Appeal, and meanwhile released the prisoner on bail.

C. T. Carr, for the appellant. The Court of quarter sessions has, in the circumstances, no power to sentence the appellant. Sect. 6, sub-s. 5, of the Probation of Offenders Act, 1907, only applies to a case where a person has been bound over "to appear for conviction and sentence," that is to say, a case which has been dealt with by a Court of summary jurisdiction under s. 1, sub-s. 1. The Act contains no provision enabling a Court to sentence a person who has been bound over under s. 1, sub-s. 2,

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and sentence him for the original offence or, if the case was one in which the Court in the first instance might, under section fifteen of the Industrial Schools Act, 1866, have ordered the offender to be sent to a certified industrial school, and the offender is still apparently under the age of twelve years, make such an order."

1910

REX v. SPRATLING.

after conviction on indictment. The Larceny Act, 1861, s. 117, does not apply to this case, for although under that section the Court may require a convicted person to enter into recognizances, that is to be in addition to or in lieu of the punishments authorized by the Act.

Garland, for the Crown. Sect. 1, sub-s. 2, of the Act of 1907 does not, except as to release on probation, add anything to the common law powers of the Court: see Russell on Crimes (7th ed.), p. 227; and a Court of quarter sessions has always possessed, as an incident to its jurisdiction, power to postpone judgment or sentence (1), and to order a convicted person to enter into recognizances to come up for sentence when called upon. It was therefore unnecessary that in the Act of 1907 express power should be given to sentence a person convicted on indictment who has failed to observe the conditions of his recognizance.

Cur. adv. vult.

Oct. 24. The judgment of the COURT (Lord Alverstone C.J., Pickford and Lord Coleridge JJ.) was read by

PICKFORD J. The appellant in this case was convicted at the Somerset quarter sessions of larceny, and was required to enter into recognizances under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1, sub-s. 2, to appear for sentence when called upon. The recognizance contained conditions authorized under the circumstances by the Act, and for a breach of one of these conditions the appellant was called upon to appear before the quarter sessions for sentence. It was not disputed that he was properly so brought before the Court under s. 6 of the Act, but it was contended that there was no jurisdiction to pass sentence on him, because s. 6, sub-s. 5, of the Act only applied to persons bound over to appear for conviction and sentence and does not apply to a person bound over to appear for sentence only. Sect. 1 of the Probation of Offenders Act contemplates two classes of cases. Sub-s. 1 applies to persons tried before a Court of summary jurisdiction and empowers the Court, if it thinks that the charge is proved, without proceeding

(1) See *Keen* v. *Reg.*, (1847) 10 Q. B. 928.

to conviction, to require the prisoner to enter into recognizances to appear for conviction and sentence when called on. Sub-s. 2 applies to persons convicted on indictment and enables the Court to require them to enter into a like recognizance to appear for sentence only. Sect. 6, sub-ss. 1 to 4, provides that a prisoner bound over to appear for conviction or sentence may be brought before the Court, and sub-s. 5 empowers the Court to convict and sentence a prisoner bound over to appear for conviction and sentence without further evidence. It was contended that the substitution of the word "and" for the word "or" shewed that this sub-section was intended only to apply to the class of cases contained in s. 1, sub-s. 1, and that, therefore, there was no power to sentence this appellant. For reasons given hereafter, we think it very likely that sub-s. 5 was only intended to apply to that class of cases, but we think that whether that be so or not the Court had jurisdiction, apart from any special provision of the Probation Act, to pass sentence.

We think that, apart from any statutory provisions, the Court of quarter sessions had power to bind over the appellant to appear for sentence when called upon. It was not, and could not be, denied that that Court had power to sentence him at the time he was convicted. We think it equally clear that it had power to postpone sentence till a future day. It also had power to release him on bail on his own recognizances. To bind him over to appear for sentence when called upon is only to postpone sentence, and in the meanwhile release the prisoner on bail. This power has constantly been acted upon, and we see no reason to doubt that it exists, and that the jurisdiction to pass sentence still remains in the Court. We must not, however, be taken to decide that the Court can postpone sentence sine die against the will of the prisoner. In this case the appellant was bound over under the provisions of the Probation Act. Such provisions may confer a larger power of inserting conditions in the recognizance than existed before, but they cannot, in our opinion, divest the Court of the jurisdiction to pass sentence, which it possessed independently of the Act. We think, therefore, that it is immaterial whether s. 6, sub-s. 5, of the Probation

1910

REX v. SPRATLING.

Act applies to this case or not. We were referred to the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 117, but it does not seem to us to apply to this case, as it gives power to make the requirement to enter into recognizances a part of the sentence of the Court in lieu of, or in addition to, punishment by way of fine or imprisonment.

It seems to us, however, that in all probability sub-s. 5 was not intended to apply to this case, but only to cases under s. 1, sub-s. 1, and that it was considered unnecessary to confer a special power to pass sentence in cases like the present because it was recognized that such power already existed. In cases under s. 1, sub-s. 1, which are tried before a Court of summary jurisdiction, it must be remembered that before the Court can pass sentence it must convict the prisoner. Although the Court before which he is brought for a breach of his recognizance may be the same Court, it may consist of members other than those who were present on the day of trial, and it may very well have been considered that they could not, in the absence of special provisions, convict a prisoner without having evidence before them to prove the original charge, while in the case of a convicted prisoner no such difficulty could arise. This view is strengthened by the fact that the Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25) (repealed by the Probation of Offenders Act, 1907), which dealt only with convicted prisoners such as are mentioned in s. 1, sub-s. 2, of the Act of 1907, contained no express power to pass sentence and assumed the existence of the jurisdiction which we have held to exist. In s. 2, sub-s. 2, that Act provides for the course to be pursued if the offender be not brought forthwith before the Court having power to sentence him, and provides that he may be remanded until the sitting of a Court having power to deal with his original offence. The Court mentioned in that sub-section is not defined, but it can only be the Court before which he was tried, and the jurisdiction of that Court to pass sentence seems to be assumed.

We think, therefore, that s. 6, sub-s. 5, was probably added for the purpose of providing for a new class of cases introduced by the Act of 1907, and purposely refrained from dealing with

other cases, but that there was power to pass sentence apart from that section altogether.

1910

REX v. SPRATLING.

The case must be remitted to quarter sessions that sentence may be passed on the appellant.

Case remitted to quarter sessions.

Solicitors for appellant: *Gibson & Weldon, for C. O. Bennett, Bruton.*

Solicitor for the Crown: *William Bennett, Wincanton.*

F. O. R.

THE KING *v.* PROPERT.

1910

Nov. 9.

Rate—General District Rate—Power to rate Owner instead of Occupier—Reduced Assessment—Owner in Occupation of Premises—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*a*).

The provisions of s. 211, sub-s. 1 (*a*), of the Public Health Act, 1875, as to assessing an owner on a reduced annual value, where the owner is rated instead of the occupier, do not apply to a case where the owner is himself the occupier of the premises to be rated.

RULE NISI calling upon the auditor of the Glamorganshire audit district, which comprised the urban district of Rhondda, appointed to examine the accounts of the council of the said urban district to shew cause why a writ of certiorari should not issue to bring up and quash a certificate of surcharge made by him and dated February 11, 1910, whereby 2*l.* 11*s.* 4*d.* was surcharged upon Edward Jones, the late chairman, and Thomas Thomas, the late chairman of the finance committee, of the council of the said urban district.

The Rhondda Urban District Council had exercised the option given to it by s. 211, sub-s. 1 (*a*), of the Public Health Act, 1875 (1), and had rated to the general district rate made on

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect; (namely)

"(1.) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by

1910

REX v. PROPERT.

November 19, 1908, for the period ending March 1, 1909, owners instead of occupiers of premises liable to assessment under the Act, of which the rateable value did not exceed 10*l.* A number of these owners were also occupiers of their premises; and in reducing the rateable value of the premises by one-third of the value, thereby granting an abatement to the owners thereof by one-third of the general district rate, as is provided by s. 211, sub-s. 1 (*a*), the council made no distinction between those owners who were and those who were not the occupiers of their premises.

The auditor, contending that the council had no power to make the allowance or abatement, contemplated by the section, in the case of owners who were themselves occupiers of the premises rated, surcharged upon the above-mentioned Jones and Thomas, who as councillors had been parties to the reduction of the assessments, the sum of 2*l.* 11*s.* 4*d.* That sum was the difference between the amount actually demanded and collected in respect of the rate from ten persons who were the owners and occupiers of the hereditaments in respect of which they were respectively assessed and the amount which would have been

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the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions regulations and conditions; (namely,)

"(*a*) The owner, instead of the occupier, may at the option of the urban authority be rated in cases—

"Where the rateable value of any premises liable to assessment under this Act does not exceed the sum of ten pounds; or

"Where any premises so liable are let to weekly or monthly tenants; or

"Where any premises so liable are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly:

"Provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two thirds nor more than four fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers:"

collected from those ten persons if they had been rated on the full net annual value of the hereditaments respectively occupied by them.

Konstam shewed cause against the rule. Under s. 211 of the Public Health Act, 1875, a general district rate is in the first instance to be made on the same persons and in the same manner as the poor rate, that is to say, the occupier is the person to be rated. Then clause (*a*) of sub-s. 1 introduces an exception by which in the case of small tenements "the owner instead of the occupier" may be rated, and since the rating of the owner instead of the occupier of premises of small value gave the urban authority a greater security for payment, the section goes on to confer a benefit on owners by providing that they shall only be assessed on a reduced estimate of the annual value. But where an owner of a small tenement is also the occupier, the urban authority run no risk of the rate not being paid, and there is no reason why the owner in that case should have the corresponding benefit. The section clearly indicates that an owner who is also the occupier must be rated as occupier and not as owner. The surcharge was therefore rightly made. [He referred to the Poor Rate Assessment and Collection Act, 1869, s. 4, *Norwood Overseers* v. *Salter* (1), and *Reg.* v. *Barclay.* (2)]

Ryde, K.C., in support of the rule. The opening words of s. 211 shew that the class of person who is primarily liable to be rated is the occupier, and after the word "occupier" there must clearly be read in the words "whether he is the owner or not"; and in sub-s. 1 (*a*) the word "owner" must be read as indicating a class of persons who are owners as distinguished from the class who are occupiers. An owner does not cease to be a member of that class merely because he happens also to occupy the premises which he owns. The word "owner" in sub-s. 1 (*a*) should therefore be read as including an owner who is also occupier.

LORD ALVERSTONE C.J. The question in this case turns entirely on the meaning of s. 211 of the Public Health Act,

(1) [1892] 2 Q. B. 118. (2) (1881) 8 Q. B. D. 306 (1882); 486.

1910

REX v. PROPERT.

Lord Alverstone C.J.

1875, and we have no doubt as to what our decision should be. There was at one time no power to rate anybody but the occupier of the premises, and it became desirable that in the case of premises of small value the rating authority should have power to rate the owner instead of the occupier, and, as it was an advantage to the rating authority to rate the owner instead of the occupier, certain privileges were granted to the owner, by allowing him an abatement or deduction from the amount of the rate, and a further abatement if the owner agreed to be rated whether the premises were occupied or not. Provisions to this effect are to be found in the Poor Rate Assessment and Collection Act, 1869, which in substance re-enacted Sturges Bourne's Act (59 Geo. 3, c. 12), as well as in the Public Health Act, 1875. By s. 211 of the latter Act it was enacted that in the cases enumerated in the section "the owner, instead of the occupier, may at the option of the urban authority be rated," and it was further enacted that where the owner is rated instead of the occupier he is to be assessed on a reduced estimate of the net annual value of the premises, and, further, that the owner shall be rated on a still lower assessment if he is rated in respect of premises whether occupied or unoccupied. It is quite obvious to my mind that the object of this legislation was to impose a liability to be rated upon persons who were not primarily liable to pay the rate. It is contended by Mr. Ryde that the privilege of being rated on a reduced assessment conferred by s. 211 applies to a case where an owner is also the occupier of the premises to be rated, and that in that case he is to be rated as an owner and not as an occupier. I think that it is a fallacy to say that when an owner is also the occupier he is to be rated as owner. He is not so rated; he is rated because he is the occupier. If the language of sub-s. 1 (*a*) is considered the point is made quite clear, because the owner is there contrasted with the occupier, the section saying "owner instead of occupier." Mr. Ryde founded an argument on the earlier part of s. 211 where the word "occupier" is used, and he said that that must include an owner who is the occupier. That is so, but the owner who is occupier becomes liable to be rated not because he is an occupying owner, but because he is an occupier. In my opinion the view taken by the auditor was

quite right; the surcharge must be confirmed, and the rule will be discharged with costs. The costs must be paid by the district council.

1910

REX v. PROPERT.

DARLING J. I agree.

PICKFORD J. I agree.

Rule discharged.

Solicitors for prosecutors: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

Solicitors for defendant: *Taylor, Rowley, Lewis & Davis, for J. C. Llewellin & Allen, Newport, Mon.*

F. O. R.

H. TOLPUTT & CO., LIMITED *v.* MOLE.

1910

Oct. 21; *Nov.* 22.

Solicitor—Registrar of County Court—Defendant in Person—Taxation—Costs as Solicitor—Registrar acting as Solicitor in his own Court—Taxation by Registrar of his own Bill of Costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 41, 43, 118.

Sect. 41 of the County Courts Act, 1888, which provides that a registrar of any county court shall not be engaged as solicitor for any party in any proceeding in that court, does not prevent a registrar, who is a solicitor, from defending himself in person in an action brought against him in his own court, or from recovering from the plaintiffs in the action such costs as a solicitor defendant is entitled to on taxation; and by reason of s. 118 of the Act, which provides that all costs shall be taxed by the registrar of the court in which they were incurred, the registrar's bill of costs must, of necessity, be taxed by the registrar himself.

London Scottish Benefit Society v. *Chorley*, (1884) 13 Q. B. D. 872, discussed

APPEAL from the Redhill County Court.

The defendant was the registrar and high bailiff of the Redhill County Court. He was also a practising solicitor. The plaintiffs brought an action against the defendant in that Court alleging negligence by him in his capacity as registrar and high bailiff. The defendant acted as his own solicitor in the action

1910

H. TOLPUTT & CO., LIMITED v. MOLE.

and was represented by counsel at the trial. The county court judge gave judgment for the defendant with costs on the higher scale, column B. The defendant thereupon brought in his bill of costs for taxation, and gave notice of a taxation before himself. The plaintiffs' solicitor attended the taxation under protest.

The total amount of the bill was 20*l.* 8*s.*, of which 11*l.* 0*s.* 6*d.* represented payments to counsel and witnesses.

The bill contained the following, amongst other, items:—

	£	*s.*	*d.*
"Instructions to defend	0	6	8
"Perusing plaintiffs' notice to produce	0	5	0
"Perusing plaintiffs' notice to admit	0	5	0
"Instructions for brief	1	11	6
"Subpœnas to witnesses (three)	0	9	0
"Plaintiffs not having made required admissions as to documents, affidavit of service of notices, including engrossing, attending to be sworn, and filing	0	2	0
"Attending Court when judgment was given for defendant	1	1	0
"Attending taxation	0	6	8"

On the taxation the defendant disallowed the item of 6*s.* 8*d.* for instructions to defend and the item of 2*s.* for affidavit of service of notices; he taxed 6*s.* off the item of one guinea for attending Court and taxed 2*l.* 1*s.* 6*d.* off the costs charged in respect of payments to the witnesses. The bill as allowed amounted to 17*l.* 11*s.* 10*d.* The plaintiffs applied to the county court judge to review the taxation, and on the review the judge further taxed off the sum of 1*l.* 1*s.* 8*d.*, being 15*s.* the balance remaining of the guinea charged for attending Court and the item of 6*s.* 8*d.* charged by the defendant for attending the taxation. The plaintiffs appealed from the judge's decision on the review of the taxation.

Hume Williams, K.C., and *Barrington Ward* (*Clarke Hall* with them), for the plaintiffs. The defendant is seeking to charge the plaintiffs with profit costs. He is not entitled to do so.

Under s. 41 of the County Courts Act, 1888 (1), a registrar of a county court may not act as solicitor "for any party in any proceeding" in that Court. A registrar who is sued in his own Court may of course appear in person and defend himself, but in that case he can only recover such costs as any other litigant in person would be entitled to recover, that is to say, costs out of pocket. He must not charge for acting as solicitor for himself, for by doing so he brings himself within the prohibition of s. 41. The defendant was "a party," and he has been engaged as solicitor for a party within the meaning of s. 41.

Next, the defendant acted wrongly in taxing his own bill of costs. It is true that s. 118 of the County Courts Act provides that the costs shall be taxed by the registrar of the Court in which the costs have been incurred, but that section must be read subject to the well-recognized common law principle that "a judge who has an interest in the result of a suit is disqualified from acting except in cases of necessity, where no other judge has jurisdiction": *Serjeant* v. *Dale*, per Lush J. (2) This was not a case of necessity. The defendant could have appointed a deputy under s. 31 on the ground of "unavoidable absence," or he might have asked the county court judge to undertake the taxation.

Lastly, the county court judge in reviewing the taxation proceeded on a wrong principle, and has not correctly applied

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 41: "No registrar, treasurer, high bailiff, or other officer of any court shall, either by himself or his partner, be directly or indirectly engaged as solicitor or agent for any party in any proceeding in the said court. And every registrar, treasurer, high bailiff, or other officer of any court who shall be, by himself or his partner, or in any way, directly or indirectly, concerned as solicitor or agent for any party in any proceeding in the said court, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same by action of debt."

Sect. 43: "If an action be brought against an officer of a county court, the summons may issue in the district of which he is an officer, or in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer."

Sect. 118: "All costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force."

(2) (1877) 2 Q. B. D. 558, at p. 566.

1910

H. TOLPUTT & CO., LIMITED v. MOLE.

London Scottish Benefit Society v. *Chorley* (1), in which case Brett M.R. said that a solicitor defendant is not entitled to charge for instructions and attendances, whereas the county court judge has allowed instructions for brief and three attendances of the defendant before himself to obtain his own leave to issue subpœnas. Charges for perusing plaintiffs' notices to produce and admit have also been wrongly allowed.

Sir F. Low, K.C., and *E. E. Humphrys*, for the defendant. The whole difficulty in this case has arisen from the fact that the plaintiffs elected to sue the defendant in his own Court, whereas under s. 43 the action might have been brought in an adjoining district. The action having been brought in the defendant's Court, he was necessarily bound under s. 118 to tax his own bill of costs, for no other person had jurisdiction to do so. It was not a case in which the defendant had power to appoint a deputy, and even if it were, there was no reason why the defendant should be put to the expense of paying a deputy, when the alleged necessity of employing one was caused by the course the plaintiffs thought fit to pursue. The defendant has not been engaged as a solicitor for a party within the meaning of s. 41. That section is directed to the prohibition of the registrar acting in his own Court as solicitor for third parties. This appears from the use of the word "agent," and from the fact that s. 41 is a re-enactment of ss. 29 and 30 of the County Courts Act, 1846, in which the words were "attorney or agent." A man cannot act as attorney or agent for himself. The true position is that the defendant was a party who happened to be a solicitor. Being a solicitor defendant he is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly rendered unnecessary: *London Scottish Benefit Society* v. *Chorley*. (1) Instructions for brief is a compendious term, and it is the only item in the scale covering the cost of preparing the case, attending the witnesses, and taking their proofs. All these are matters which a solicitor defendant would be entitled to charge for, and although the county court judge has allowed 1*l.* 11*s.* 6*d.*, the maximum amount allowable under the scale, the question of amount was entirely

(1) 13 Q. B. D. 872.

a matter for his discretion as to which there can be no appeal. The charge for the issue of subpœnas also covers more than the attendance before the registrar.

Hume Williams, K.C., in reply. The plaintiffs were clearly entitled under s. 43 to sue the defendant in his own Court, and the consequent difficulties are not of their creation. The defendant was sued not as a solicitor but as registrar of the Court. He is seeking to charge profit costs, which implies that he has rendered services as a solicitor to some one. He therefore comes directly within the language of s. 41, and none the less so because that some one happens to be himself. The word "agent" in s. 41 refers to the registrar acting as agent for another solicitor.

Cur. adv. vult.

Nov. 22. The judgment of the COURT (Phillimore and Avory JJ.) was read by

PHILLIMORE J. The defendant is the registrar of the county court of Surrey holden at Redhill. He is also a practising solicitor. The plaintiff company complained of his negligence in his capacity as registrar and high bailiff in and about an execution in respect of a judgment which they had recovered. Negligence there apparently was on the part of some clerk for whom the defendant was responsible. But the county court judge thought that there had been no damage, and, therefore, gave judgment for the defendant and further gave him his costs on scale B. The defendant thereupon brought in his bill of costs and gave notice of a taxation before himself. The plaintiff company protested against such a course, and it seems grotesque. Under the common law as succinctly stated in *Serjeant* v. *Dale* (1), "a judge who has an interest in the result of a suit is disqualified from acting, except in cases of necessity when no other judge has jurisdiction." We have had, therefore, to consider whether this is a case of necessity.

Now, the plaintiff by s. 43 of the County Courts Act, 1888, had a large choice of Courts in which to sue the defendant, and he elected to sue him in his own Court. Sect. 118 provides that

(1) 2 Q. B. D. at p. 566.

1910

H. TOLPUTT & CO., LIMITED v. MOLE.

costs shall be taxed by the registrar of the Court in which such costs were incurred. Unless the defendant could have appointed a deputy, which is doubtful, he was of necessity the officer to tax the bill. Even if he could have appointed a deputy he would have apparently had to pay him or put himself under an obligation for gratuitous work. We think, therefore, this may be deemed a case of necessity.

The taxation was held. The registrar struck off some items in his own bill to the amount of 2*l.* 16*s.* 2*d.*, and then improperly gave himself a fee of 6*s.* 8*d.* for attending the taxation. There was then an application to the judge to review the taxation. The county court judge upon review struck off the 6*s.* 8*d.* and a fee which the registrar had also improperly allowed himself for attending in Court (as was his duty as an officer either in person or by deputy) when judgment was given for himself. The judge allowed the rest of the bill at 16*l.* 10*s.* 2*d.*

On appeal to us four points were taken:—(1.) That under s. 41 of the County Courts Act no registrar can act as solicitor in his own Court; (2.) that a solicitor registrar defending in person is not entitled to costs as a solicitor; (3.) that the registrar could not tax his own bill; and (4.) that the judge had taxed on a wrong principle.

The third point we have already dealt with. As to the first and second points it is true that a registrar cannot practise as a solicitor in his own Court; but we do not think that s. 41 debars him from appearing to defend himself. A solicitor appearing in person has the benefit of a special rule of practice as to costs which is established by the decision in *London Scottish Benefit Society* v. *Chorley*. (1) That rule is that he is entitled to the same costs as if he had employed a solicitor except in respect to items which the fact of his acting directly renders unnecessary. This being the case, we do not see why a defendant who is a solicitor appearing in person should lose his costs because he is also registrar.

This brings us to the fourth objection, that the judge taxed upon a wrong principle. The decision already cited puts some restriction upon the costs which a solicitor defendant can charge.

(1) 13 Q. B. D. 872.

For example, he cannot claim costs of instructing himself. Upon an analogous principle, or possibly a higher one, a registrar defendant cannot claim costs for official attendances. Upon this latter ground the county court judge rightly disallowed the two items already mentioned. Are there any other items in this bill which ought not to have been allowed? The decision already cited might have helped us as to details. But it is not well reported. The report states that the appeal was dismissed; but it was not. The order was varied and the bill was sent back to the Master for further taxation. He struck off several items, evidently because he had been enlightened by the judgment of the Court of Appeal, and because they were such as were rendered unnecessary by the fact that a solicitor was acting for himself, though they would have been allowed on an ordinary bill. We have tried to find out what these items were, but without success. The bill has not been preserved in the office or by the solicitors. We have compared the other reports, 53 L. J. (Q.B.) 551, 51 L. T. 100, 32 W. R. 781, and 28 Sol. J. 564. This latter is so short as to be inaccurate. The other reports slightly vary the language of Lord Esher M.R. or of Fry L.J., or of both, the variations being in a direction a little more adverse to the solicitor.

Doing the best we can in these circumstances we find only four items which are questionable: "instructions for brief 1*l.* 11*s.* 6*d.*" and three charges of 3*s.* each for subpœnas. This latter class of charge seems to be a fixed fee representing payment for possibly some exercise of judgment as to the summoning of the witness, at any rate for the actual drawing of the document with proper name and address and the attendance upon the registrar to procure its issue: see Higher Scale of Costs, No. 5. The only fraction that could be objected to is this attendance. "Instructions for brief" is a term of art explained partly in the case already cited and more fully in *London, Chatham, and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) It includes, or might include, work for which a solicitor defendant might not charge, namely, instructing himself. But it also includes, and apparently always includes, items for which a

(1) (1889) 60 L. T. 753.

1910

H. TOLPUTT & CO., LIMITED v. MOLE.

solicitor defendant could charge. We have consulted one of the present taxing Masters of the High Court, who informs us this is so and refers us to the case of *Bidder* v. *Bridges* (1), where Stirling J. allowed a fee of 100 guineas for instructions for brief to a solicitor defendant. It is said that here the full scale fee has been allowed, while some part of the work for which it is allowed is work for which the defendant could not charge, and that, therefore, some part of this fee must come off. This is a possible view and would warrant a deduction of some few shillings. On the other hand it might be said that in this particular case fully 1*l.* 11*s.* 6*d.* of chargeable work was done and more, and that it is only the narrow limits of scale B which cut the charges down to 1*l.* 11*s.* 6*d.*

Under these circumstances we are unable to say that the county court judge has taxed on any wrong principle, and, therefore, in our opinion this appeal should be dismissed with costs.

Appeal dismissed. Leave to appeal.

Solicitors for plaintiffs: *Collyer-Bristow & Co., for De Wet, Folkestone.*

Solicitors for defendant: *H. Tyrrell & Son.*

(1) [1887] W. N. 208.

F. O. R.

In re DARBY.
Ex parte BROUGHAM.

1910
Oct. 17, 31.

Bankruptcy—Formation of Company—Fraudulent Promoter—Debenture Issue —Secret Profit—Bankruptcy of Promoter—Proof.

A corporation consisted of only the seven signatories to its memorandum of association. It was formed by D. and G., two of the signatories, to cloak their identity in carrying on their financial operations, and they were the sole directors and managers of the corporation. The corporation then contracted to buy a licence to work a quarry for a small sum and promoted a company to acquire the licence, and the usual contracts were entered into by means of a trustee for the company, whereby the corporation as vendors agreed to sell the licence to the company for 10,500*l.* in cash, 2000*l.* in debentures, and 5500*l.* in fully-paid shares of 1*l.* each of the company. D. and G. then caused the company to be registered and found the seven signatories to its memorandum of association and its directors, all of whom were their creatures. The company duly adopted the contract of sale and issued to the corporation 5500 fully-paid shares and 2000*l.* in debentures. D. and G. then prepared prospectuses which were issued by the company to the public inviting subscriptions to an issue of 2000 debentures of 10*l.* each, and as subscriptions came in the company paid the corporation some 9000*l.* cash (on account of the 10,500*l.*), which D. and G. then divided between themselves. The only shareholders of the company were the seven signatories to its memorandum and the corporation as holders of the 5500 shares. The contracts and prospectuses disclosed that the corporation was promoter and vendor to the company and was making the profit, but did not disclose the fact that D. and G. were the real promoters and vendors and were receiving the profit through the corporation. The company went into liquidation, and subsequently D. and G. became bankrupt. D. had assets, G. had none. They were prosecuted for fraudulent and material misstatements in the prospectuses and convicted:—

Held, that under the circumstances the corporation was only an "alias" for D. and G., and that the liquidator of the company could prove in the bankruptcy of D. for the whole of the secret cash profit that D. and G. had received.

This was an appeal from the decision of the trustee in bankruptcy rejecting the proof against the debtor's estate by the liquidator of a company of which the debtor was alleged to have been the promoter under these circumstances.

In October, 1903, Walter Darby, the debtor, and one Gyde (both of whom then were undischarged bankrupts) registered

1910

DARBY, *In re.* BROUGHAM, *Ex parte.*

in Guernsey the City of London Investment Corporation, Limited (hereafter called the corporation), with a nominal capital of 100,000*l.* The corporation was registered in accordance with the Guernsey Companies Act, 1883, and its registered offices were in London. It was ostensibly formed to transact general financial business, but it was really formed to carry on the business of Gyde and Darby. Its issued capital amounted to only 11*l.* 15*s.* and was held by the seven signatories to the memorandum and articles, two of whom were Gyde and Darby, who each held 5*l.* 5*s.*, and each of the other five signatories held one 5*s.* share. The articles of the corporation did not provide for any share qualification for its directors, and Gyde and Darby were its first and only directors and managers. The profits of the corporation were divided between Gyde and Darby in the proportion of two-thirds to Gyde and one-third to Darby.

By an agreement dated November 7, 1904, and made between the corporation of the one part and one Marcus, as trustee for and on behalf of the company thereinafter mentioned, of the other part, after reciting two agreements, both dated November 4, 1904, under which the corporation had acquired a licence to work a certain slate quarry in Wales with materials and plant for the sum of 3500*l.*, payable as to 250*l.* in cash, and the balance in debentures and fully-paid shares of "a company to be formed by the corporation," and that a company was about to be formed under the Companies Acts, 1862 to 1900, having for its object (amongst other things) the acquisition of the said licence and the said materials and plant, and reciting "whereas the nominal capital of the said company is to be 30,000*l.* divided into 30,000 shares of one pound each and whereas the memorandum and articles of association have with the privity of the corporation been already prepared and whereas by the said articles of association it has been provided that the directors of the company shall immediately after the incorporation thereof adopt on behalf of the company and carry into effect an agreement therein referred to being these presents," it was agreed as follows:—

1. That the corporation should sell and the company should purchase the licence, materials, and plant mentioned in the two agreements of November 4, 1904.

2. That the consideration for the said sale should be the sum of 18,000*l.*, payable as to 5500*l.* by the allotment to the corporation or its nominees of fully-paid shares of 1*l.* each and 2000*l.* in debentures, and the balance in cash, shares, or debentures at the option of the corporation.

3. "The corporation undertakes and agrees to hold 3,000 fully-paid shares and to transfer same to the debenture-holders in the proportion of one fully-paid one pound share for every 10*l.* debenture taken up."

4 and 5 provided for the completion of the purchase and for the discharge of the trustees.

6. "The corporation shall forthwith register or cause or obtain to be registered the said slate quarry company limited and shall provide all the expenses connected with the said registration and promotion of the company including the sending out of any prospectus that may be deemed necessary up to and including the first allotment of debentures."

The seal of the corporation was affixed to this agreement by Darby and Gyde as its directors.

On November 10, 1904, the slate quarry company was registered under the name of the Welsh Slate Quarries, Limited (hereafter called the company), with a nominal capital of 30,000*l.* divided into shares of 1*l.* each, and on December 30, 1904, the usual agreement was made between the corporation of the first part, Marcus of the second part, and the company of the third part, whereby the company adopted the agreement of November 7, 1904, and Marcus, the trustee, was discharged from all liability. The seal of the corporation was affixed to this adoptive agreement by Darby and Gyde as its directors. The memorandum and articles of the company were prepared by Darby and Gyde, and the four directors of the company were obtained by them, and by the articles of the company no director's qualification was necessary. The 5500 fully-paid shares and 2000*l.* in debentures were allotted to the corporation or its nominees. The corporation elected to take the balance (10,500*l.*) of the purchase price in cash, and received 9200*l.* on account, the remainder being unpaid at the date of the winding up of the company. No prospectus inviting the public to subscribe for shares was issued

1910

DARBY, *In re.* BROUGHAM, *Ex parte.*

by the company, but the 9200*l.* was part of a sum of 14,060*l.* which was obtained from the public by way of subscriptions to 1406 debentures and in answer to six prospectuses prepared by Darby and Gyde and issued by the company between November, 1904, and July, 1905. All these prospectuses were in substantially the same form and invited subscriptions to an issue of 2000 debentures of 10*l.* each and offered one fully-paid share for each paid up debenture of 10*l.* The prospectuses stated all the agreements above mentioned, which disclosed that the corporation was the vendor and promoter of the company and was making the large profit on the sale, but did not disclose that Darby and Gyde were promoters and were to receive the profit through the corporation.

In October, 1905, the company went into voluntary liquidation, which was superseded in February, 1906, by a compulsory order on a creditor's petition, when a receiver was appointed on behalf of the debenture-holders. The assets of the company realized only about 160*l.*, and the receiver was discharged in July, 1906, when Mr. Brougham, the senior official receiver in companies winding up, became the liquidator of the company.

In March, 1908, Darby and Gyde were adjudicated bankrupts a second time, and subsequently were prosecuted for fraudulent statements and misrepresentations in the said prospectuses of the company, and were convicted. Darby had considerable assets, but Gyde had none.

In 1910 the liquidator of the company lodged a proof against Darby's estate for 8950*l.* for damages for his breach of trust as promoter of the company or, alternatively, for moneys had and received to the use of the company in respect of undisclosed profits as such promoter. This 8950*l.* was the balance of the 9200*l.* less 250*l.* cash paid under the agreement of November 4, 1904, for the purchase of the property sold to the company. The trustee in bankruptcy rejected the proof on the grounds (1.) that the debtor was not a promoter and that, if he was, no legal liability on his part in respect of any part of the claim was disclosed, and (2.) that the claim was from its nature not provable. The liquidator appealed against the rejection of his proof.

1910

DARBY, *In re.* BROUGHAM *Ex parte.*

Hon. Frank Russell, K.C., and *Howard Wright*, for the liquidator. The contracts disclosed in the prospectus allege that the corporation was the promoter and vendor and that a large profit was to be made, but the evidence shews that Darby and Gyde were the real promoters and vendors and that the profit went to them, and that they employed the corporation as their agent for the purpose. The corporation in fact was an "alias" for Darby and Gyde and the hand by which they fraudulently and secretly obtained this money from the public by means of the company, and it is submitted that they cannot retain it as against the company: *Emma Silver Mining Co.* v. *Grant* (1); *In re Leeds and Hanley Theatres of Varieties, Ld.* (2); *In re Collie* (3); *Gluckstein* v. *Barnes.* (4)

Jenkins, K.C., and *Greer*, for the official receiver. This is a claim by the liquidator of the company and not by the debenture-holders. The company was formed for the express purpose of carrying out the contracts. What wrong has Darby inflicted on the company? The prospectus did not invite subscriptions for shares. The wrong, if any, was not done to the company, but to the debenture-holders, and promoters are not in a fiduciary position to the creditors of a company. The fraud, if any, was not perpetrated on the company, but on the public. There never were any shareholders of the company but the corporation and the seven signatories to the memorandum and articles, and it is immaterial that Darby and Gyde controlled the company. It must be shewn that the corporation did wrong. The corporation was not the "alias" of Darby and Gyde: *Salomon* v. *Salomon & Co.* (5) It was the real promoter and vendor, and the contracts mentioned in the prospectus shew that it was the vendor to and promoter of the company and was making the profit. To support a claim for damages it must be shewn that a fraudulent secret profit was made: *Hichens* v. *Congreve* (6); *Gluckstein* v. *Barnes.* (7) Here no shares of the company were ever issued for cash. The corporation held all the share capital, except the

(1) (1880) 17 Ch. D. 122.
(2) [1902] 2 Ch. 809.
(3) (1878) 8 Ch. D. 807.
(4) [1900] A. C. 240, 248, 255.
(5) [1897] A. C. 22.
(6) (1831) 4 Sim. 420.
(7) [1900] A. C. 240, 248.

1910

DARBY, *In re.* BROUGHAM, *Ex parte.*

seven signatories who held 1*l.* each and were the creatures of Darby and Gyde, and the directors of the company, who knew that the profits went to Darby and Gyde. All the members of the company knew what was done, there was no fraud on the company, and the fact that it was not sanctioned by a general meeting of the company was a mere irregularity: *In re British Seamless Paper Box Co.* (1)

[PHILLIMORE J. referred to *Society of Practical Knowledge* v. *Abbott.* (2)]

It is submitted that the corporation did no wrong, and it makes no difference that Darby and Gyde formed the corporation for their own purposes. The contracts for sale between the corporation and the company are binding on the latter because, as between them, there is no evidence of any fraudulent statement or concealment, and unless the liquidator has a claim against the corporation he has no claim against Darby's estate.

Hon. Frank Russell, K.C., in reply. *Salomon* v. *Salomon & Co.* (3) is distinguishable. In was an honest company and an honest transaction. *In re British Seamless Paper Box Co.* (1) is also distinguishable on the same ground. Here, on the evidence, the corporation was a mere "alias" for Darby and Gyde, and the entire transaction was a fraudulent scheme. Darby and Gyde were the real promoters and vendors and stood in a fiduciary position to the company. It was a breach of trust on their part to plant this worthless slate quarry on the company, and they ought to account for the undisclosed profit that they made.

PHILLIMORE J. The proof in this case is for damages for breach of trust as promoter of the company called the Welsh Slate Quarries, Limited, or alternatively for moneys had and received to the use of the said company in respect of the undisclosed profits as such promoter, and it was presented by the official liquidator of the company in the bankruptcy of one Darby. It was rejected by the official receiver acting as trustee, and it is the rejection of that proof that is now appealed against.

(1) (1881) 17 Ch. D. 467. (2) (1840) 2 Beav. 559.
(3) [1897] A. C. 22.

It is admitted that, if the proof is to stand, it must be reduced, because some allowance must be made for the necessary costs of promotion incurred by the promoters, and I have to decide whether the appeal, with that limitation, ought or ought not to succeed.

Now this case certainly does seem to me to be an advance upon the previous decisions. Darby and Gyde (who are two fraudulent persons, both of whom have been convicted of fraud in the present case, and of several previous crimes) registered in Guernsey a company called the City of London Investment Corporation, of which they were the proprietors. It was merely an alias for themselves just as much as if they had announced in the *Gazette* that they were in future going to call themselves "Rothschild & Co." It was merely a name under which they carried on business, and I am quite clear in my own mind that that was their object, and that, whenever they represented that some business was being done by or through the corporation and concealed the fact that it was being done by or through Darby and Gyde, they were by that mere fact probably perpetrating a fraud. I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves. Having registered that corporation, and being minded to perpetrate a very great fraud, they, as such corporation, agreed to buy a trivial interest in a Welsh slate quarry for a small sum in cash and a consideration in shares, and then as such corporation purported to sell this interest to the Welsh Slate Quarries, Limited, and thereby they made a very large profit. It is said that they concealed that profit, and also that they concealed from the Welsh Slate Quarries, Limited, the fact that they were themselves the real vendors and promoters, and therefore it is contended that the liquidator is entitled to recover the profit from them. It is argued by Mr. Jenkins, on behalf of the official receiver as trustee of the estate of the

1910

DARBY, *In re.* BROUGHAM, *Ex parte.*

Phillimore J.

bankrupt, that there was ample disclosure made of this profit in the prospectus issued to the debenture-holders, that substantially the persons injured were the debenture-holders, that there were no shareholders in the company other than the fraudulent persons themselves or their nominees or co-conspirators, and therefore that nothing can be recovered in this proceeding. Now, if this were an application made on behalf of the debenture-holders, or if, to put it in another way, the prospectus, instead of being a prospectus to debenture-holders, had been a prospectus issued on the formation of the company to obtain subscriptions for shares, it might have been quite fairly said that there were sufficient indications to open the eyes of reasonable people to the fact that a very large profit was being made on these shares, and that there was enough also to disclose (if one is to regard the City of London Investment Corporation as a distinct corporation) the fact that the vendor was also the promoter, and therefore that this case does not come under the authority of *In re Leeds and Hanley Theatres of Varieties.* (1) If it is right to call the City of London Investment Corporation "the promoter," there was sufficient disclosure on the prospectus to debenture-holders that it was the promoter and the vendor; but the complaint made against the prospectus is that it alleges that the City of London Investment Corporation was the promoter and vendor, whereas in truth and in fact Darby and Gyde were the promoters and vendors. I think it is probable that this would be enough, if I was dealing with a prospectus issued on the formation of a company inviting subscriptions for shares, to upset the transaction, because it would be an untrue statement as to who were the real promoters. But I do not think I need consider that matter at all, because the debenture-holders here cannot as such support the claim in this case, and I have not got to consider whether the money was obtained from them by fraud or not. What I have got to consider is whether Darby and Gyde can, under their title of the City of London Investment Corporation, retain any of the profits which they made upon the sale to the company. The fact that they got their profit by means of the debentures indicates only that that was the machinery by which

(1) [1902] 2 Ch. 809.

they obtained the money that was their profit. Now they made that profit either directly or through the agency of the corporation, it does not matter which, and they may hold it if they disclosed it at the proper time. They may not hold it if they did not disclose it, and the burden of shewing that they did so disclose it is upon them. It is said that they did so because they disclosed it to themselves. Well, there were, it is true, no shareholders in the company except the corporation (that was themselves) and the seven original signatories to the memorandum of association, but it was in contemplation that the corporation should transfer a large portion of the shares to the debenture-holders in the proportion of one share to each debenture, and that was put forward in the prospectus as an inducement. I am not sure that that is enough to upset the transaction, but this I do say, that people who in fact are cheating the public and who rely upon a technical notice that they have given must prove it. In *In re British Seamless Paper Box Co.* (1) it was apparently considered that there there was no fraud, but only an irregularity which was known to everybody who at the time could have had any interest, and which was sanctioned and ratified. That case and to a certain extent *Gluckstein* v. *Barnes* (2) and the old case of *Society of Practical Knowledge* v. *Abbott* (3) seem to me to be the cases by which I must steer in deciding this case, and I come to the conclusion that Gyde and Darby did not protect themselves and did not disclose the profit which they obtained. Had they called a general meeting of the shareholders and disclosed the profit and received authority from the shareholders to keep it, it might perhaps have stood. But they did not do so, and therefore they cannot keep this profit. I agree that the case runs on fine lines and that it is to a certain extent novel, but on the whole I think that the right decision is to allow the appeal with the limitation which has been agreed upon.

Appeal allowed.

Solicitors: *W. A. Headley; Tarry, Sherlock & King.*

(1) 17 Ch. D. 467. (2) [1900] A. C. 240.

(3) 2 Beav. 559.

H. L. F.

1910

Oct. 17, 31.

In re ROGERS.

Ex parte THE SHERIFF OF SUSSEX.

Bankruptcy - Judgment Creditor—Writ of Fi. Fa.—Seizure by Sheriff—Claimant—Interpleader Summons—Sale by Sheriff—Bankruptcy of Execution Debtor—"Costs of Execution"—Sheriff's Costs of Interpleader—Execution Creditor's Costs—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 46—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 118, 119.

A bill of sale holder claimed goods of a judgment debtor which the sheriff had seized under a writ of fi. fa., and the sheriff interpleaded. On the hearing of the interpleader summons the validity of the bill of sale was admitted and an order was made for the sale of sufficient goods to pay the claim and the claimant's costs, the execution creditor's costs, and the sheriff's costs, and for payment of the balance to the execution debtor. Pending the sale the execution debtor became bankrupt, and the official receiver stopped the sale before it was completed :—

Held, that the sheriff's costs of the interpleader were "costs of the execution" within the meaning of s. 11 of the Bankruptcy Act, 1890; but that the claimant's costs and the execution creditor's costs of the interpleader were not "costs of the execution" within that section which the sheriff could deduct from the proceeds of sale as against the official receiver.

THIS was an application to review the decision of the taxing Master in bankruptcy with respect to the sheriff's costs of an execution under these circumstances.

The debtor was an hotel proprietor at Worthing, and on January 1, 1910, the sheriff seized the goods at the hotel under three writs of fi. fa. issued by three judgment creditors of the debtor.

On January 4 the goods were claimed by one Skelding under a bill of sale, but his claim was disputed by the judgment creditors, and thereupon the sheriff issued the usual interpleader summons, and on January 10 an interpleader order was made in each action in the following form :—"It is ordered that the above-named sheriff proceed to sell enough of the goods seized under the writ of fi. fa. issued in this action to satisfy the expenses of the sale, the rent (if any) due, the claim of the claimant, and this execution. And it is further ordered that out of the proceeds of the said sale (after deducting the expenses and rent, if any), the said

sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant. And it is further ordered that no action be brought against the said sheriff, and that the costs and charges of the sheriff, the plaintiff's costs of this application, and the claimant's fixed costs of 1*l.* 1*s.* be paid out of the proceeds of the said sale."

The interpleader summons was not served on the execution debtor and he was not a party to this order.

Acting on this order, the sheriff advertised a sale of the goods for January 19, 20, and 21, but on January 15 he received a notice from the official receiver that the debtor had filed his own petition on January 14, on which a receiving order had been made the same day. On receipt of this notice the sheriff wrote to the official receiver informing him of the order of January 10 and of the advertised sale and asked for instructions. On January 17 the official receiver replied that he had no instructions to give as to the sale. On January 18 the sheriff again wrote to the official receiver, who replied that the matter was in the hands of his solicitors, Messrs. Bullock & Sadler. On the morning of January 19 the sheriff waited on Messrs. Bullock & Sadler, who told him that he had better proceed and sell the goods. The sale accordingly proceeded on January 19 and 20, when 490*l.* 10*s.* 6*d.* was realized, but on the morning of January 21 the usual notice to deliver goods, &c., to the official receiver was served on the sheriff, and the sale was not further proceeded with.

Out of the 490*l.* 10*s.* 6*d.* the sheriff paid the auctioneer's charges of 38*l.* 17*s.* 6*d.*, the landlord's rent of 70*l.* 12*s.* 6*d.*, and 254*l.* 3*s.* 4*d.*, being the amount due on the bill of sale, and on March 4 his costs and charges were taxed in each action under the order of January 10 by a taxing Master of the King's Bench Division. This taxation was attended by the solicitor of the Board of Trade on behalf of the official receiver, who contended that, inasmuch as the debtor had been made a bankrupt before the sale of the goods took place, the taxing Master had no right to tax the costs and charges, and that they were not payable out of the proceeds of sale, but the taxing Master held that he was

1910

ROGERS, *In re.* SUSSEX (SHERIFF), *Ex parte.*

bound to tax the sheriff's costs and charges under the order, and in each action taxed and allowed (amongst other items) an item of 11*l.* 18*s.*, being the sheriff's costs of the interpleader, an item of 8*l.* 18*s.* 8*d.*, being the execution creditor's costs of the interpleader, and an item of 1*l.* 1*s.*, being the claimant's costs of the interpleader.

On March 7 the sheriff sent the official receiver a statement of account shewing how he had dealt with the 490*l.* 10*s.* 6*d.*, with a cheque for the balance. In this account he deducted the items above mentioned in respect of each action as taxed and allowed under the order of January 10; but on March 14 the official receiver informed the sheriff that he had lodged the statement with Master Tanner, the taxing Master in bankruptcy, and had obtained an appointment to tax under r. 119 of the Bankruptcy Rules, 1886 and 1890, and s. 11 of the Bankruptcy Act, 1890. The sheriff attended the taxation in bankruptcy and strongly protested that his statement of account was not subject to taxation, as his costs and charges had already been taxed by the King's Bench Master and the allocaturs had been granted. The bankruptcy taxing Master, however, proceeded to tax and disallowed the items 11*l.* 18s. and 8*l.* 18*s.* 8*d.* on the ground that they were not part of the "costs of the execution" referred to in s. 46 of the Bankruptcy Act, 1883, and in s. 11 of the Bankruptcy Act, 1890, and rr. 118 and 119 of the Bankruptcy Rules, 1886 and 1890. The sheriff objected that the two items in question were "costs of the execution" within the Bankruptcy Acts and Rules. The taxing Master's answer was as follows: "The Master in the King's Bench Division adjudicated upon them and issued his allocatur as against the proceeds of sale as directed by certain orders while I have to tax only the sheriff's 'costs of execution' as against the debtor's estate, as provided by the Bankruptcy Acts and Rules. Such costs do not include his solicitor's costs of interpleader proceedings, nor those of the execution creditor or claimant of such proceedings, all of which ought to be paid by the losing party."

The taxing Master adhered to his decision, and the sheriff now moved to review his taxation.

Frank Mellor, for the sheriff. The question in this case is what are the sheriff's costs of the execution under s. 11 of the Bankruptcy Act, 1890, which reproduces with amendments s. 46 of the Bankruptcy Act, 1883. Here there was a valid bill of sale, and nobody could get dominion over the goods without getting rid of the bill of sale. The sheriff was bound to give notice to the official receiver and bound to proceed with the sale until the official receiver intervened, and under sub-s. 1 of s. 11 he has a charge on the proceeds of sale for his costs and charges. In *Stern* v. *Tegner* (1), which may be cited by the opposite party, the official receiver intervened at a much earlier stage and before the order for sale had been made. Here bankruptcy did not put an end to the proceedings until the notice was served on January 21, and the official receiver was only entitled to the goods unsold. The costs of an interpleader properly incurred are part of the sheriff's costs, and the bankruptcy taxing Master ought to have had regard to the order of January 10, and rr. 118 and 119 of the Bankruptcy Rules do not apply. But even if the taxing Master was not bound to give effect to that order, he ought under the circumstances to allow the items in question as part of the sheriff's costs and disbursements under the execution.

Hansell, for the official receiver. It has hitherto been the invariable practice in bankruptcy that the increased costs of execution incurred by interpleader should not be allowed out of the debtor's estate. Here the order of January 10 was a consent order and directed that the costs of all parties should come out of the proceeds of sale, but the execution debtor was not a party to the order. The strict order is that the party who fails shall pay the costs of the interpleader. The interpleader order gave the sheriff no right to payment out of the proceeds in this case, inasmuch as the bankruptcy of the execution debtor supervened. If there had been no bankruptcy, the order might have bound the proceeds of sale, but the moment that bankruptcy took place the Bankruptcy Acts and Rules came into force, and one must look to them to see whether these deductions by the sheriff could be allowed. The execution creditor was not a secured creditor,

(1) [1898] 1 Q. B. 37.

1910

ROGERS, *In re.* SUSSEX (SHERIFF), *Ex parte.*

and on January 15 the goods, subject to the bill of sale, became the goods of the official receiver, and the execution creditor had no rights because he had not perfected his title by seizure and sale. The only person interested on January 19 was the bill of sale holder, who was content to be paid off. Here rr. 118 and 119 shew what has to be done, and it is submitted that r. 119 applies and that the sheriff brought in his bill of costs under that rule. These costs which he has deducted have never been allowed in bankruptcy. The practice is that the party who fails pays the costs of interpleader, and in the events which have happened the sheriff must look to the execution creditor for payment of his costs, and not to the debtor's estate. There is no direct authority, but *In re Levy* (1), *In re Harrison* (2), *Goodman* v. *Blake* (3), and *Smith* v. *Darlow* (4) support this view.

Frank Mellor in reply. It has been the invariable practice in interpleader not to make the execution debtor a party. There is a fallacy in saying the unsuccessful party must pay the costs. There was here no unsuccessful party. There was enough to pay the claims of all parties. The course adopted was the most expeditious way of realizing the assets, and the official receiver took the benefit of it. The sheriff relies on the fact that the official receiver allowed the sale to proceed and did not intervene until he saw there was something coming to him.

Cur. adv. vult.

Oct. 31. PHILLIMORE J. delivered the following written judgment:—This is an application to review the taxation of costs. Judgment was delivered in the King's Bench Division against the bankrupt, who was an hotel keeper, and three writs of fi. fa. were issued to the sheriff of Sussex, under which he took possession. Thereupon a claimant appeared, claiming under a bill of sale, and, as the judgment creditors did not immediately admit his claim, the sheriff took out interpleader summonses. When these summonses came on for hearing the claimant and

(1) (1890) 7 Mor. 125.
(2) (1893) 10 Mor. 106.
(3) (1887) L. R. 19 Q. B. D. 77.
(4) (1884) 26 Ch. D. 605, 612; White Book, 1911 ed., pp. 975, 976.

1910.

ROGERS, *In re.* SUSSEX (SHERIFF), *Ex parte.*

Phillimore J.

the judgment creditors were all of opinion, and as it turned out rightly, that there would be sufficient to pay the claimant and leave a surplus perhaps sufficient to satisfy the judgments—at any rate going some way in that direction. Apparently also the judgment creditors were satisfied that the claimant's title was good. In these circumstances the Master made the following order on January 10, 1910. [His Lordship read the order, and continued :—] It is possible, though I cannot say for certain, that the Master took this as an order made by consent of all parties, and that it did not occur to him that there was another person, to wit, the judgment debtor, who might have plausibly contended that his rights were infringed by the provisions as to costs, or, at any rate, by some of them. However that may be, this was the order. On January 14 a receiving order was made against the debtor, and notice was forthwith given by the official receiver to the sheriff. Before this the sheriff had made arrangements for the sale of the goods to take place on January 19, 20, and 21. This was known to the official receiver, who directed or permitted the sale for the first two days and stopped it before the third day, enough having been realized on the first and second days to pay off the claimant and leave a surplus. The sheriff having received the proceeds of sale for these two days paid off the claimant, paid the auctioneer, retained certain costs and charges, rendered an account to the official receiver, and paid over the balance to him. This as it seems to me he did under sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, and thereupon the official receiver could require the sheriff's charges to be taxed under r. 119, which provides: "If the official receiver or trustee shall, in writing, require any costs which a sheriff has deducted under [section 11 (2.) of the Bankruptcy Act, 1890] to be taxed, the sheriff shall, within seven days after the date of the request, bring in such costs for taxation, which shall be taxed by the taxing officer of the Court having jurisdiction in the bankruptcy, and any amount disallowed on such taxation shall forthwith be paid over by the sheriff to the official receiver or trustee as the case may require." The official receiver, mistakenly as I think, considered that sub-s. 1 of s. 11, and therefore r. 118, applied. The error is not,

1910

ROGERS, *In re.* SUSSEX (SHERIFF), *Ex parte.*

Phillimore J.

however, of grave importance. A taxation was held which can be supported as being under r. 119. On that taxation the bankruptcy taxing Master taxed off these items:

Messrs. Dixon's (the claimant's solicitors) costs of interpleader.

The execution creditors' solicitors' taxed costs.

Messrs. Palmer & Bull's taxed costs: these last are those of the sheriff.

Objections to this taxation were brought in by the sheriff. They were as follows: "(*a*) that they [i.e., these items] have already been adjudicated upon and an allocatur given in respect thereof by Master Alexander on the 5th day of March, 1910, and that therefore Master Tanner had no jurisdiction to disallow the said items as not being costs of execution; (*b*) that the said items are costs of execution within section 11, sub-sections 1 and 2, of the Bankruptcy Act, 1890, and the Bankruptcy Rules 118, 119." To which the taxing Master replied as follows: "The Master in the King's Bench Division adjudicated upon them and issued his allocatur as against the proceeds of sale as directed by certain orders while I have to tax only the sheriff's 'costs of execution' as against the debtor's estate, as provided by the Bankruptcy Acts and Rules. Such costs do not include his solicitor's costs of interpleader proceedings, nor those of the execution creditor or claimant of such proceedings, all of which ought to be paid by the losing party."

Where upon a seizure under a fi. fa. a claimant appears and interpleader proceedings follow, as between disputants, the usual practice is to treat them as ordinary litigants and in proper cases make the unsuccessful party pay the costs of the successful party. The sheriff may also have an order for his costs directly against an unsuccessful claimant. But if he prefers he may have the order against the successful judgment creditor, leaving the latter to add the sheriff's costs to his own and recover them against the unsuccessful claimant. If the judgment creditor is unsuccessful, he pays the sheriff's costs and has to bear them: see *Smith* v. *Darlow*. (1) Where a claimant is successful, but there will be a surplus available for the judgment creditor, it

(1) 26 Ch. D. 605.

may be said in a sense that both are successful, but only in a sense. In strictness the goods ought not to have been seized, and the claimant is entitled to his costs against the judgment creditor. I am not aware of any decision dealing with the question whether the judgment creditor can in such a case add the costs which he pays to the claimant to his own and charge them as part of the costs of the execution. My judgment is that he cannot so charge them. But if the seizure and the interpleader proceedings lead to an order such as was made in this case, under which the goods are sold, the prior incumbrance of the claimant is discharged, and, a fruitful surplus remaining, any costs of the judgment creditor which are conducive to this result, and not inflamed by an unnecessary dispute between him and the claimant, would be proper costs in the execution to be paid out of the proceeds of the goods seized and sold. A fortiori the sheriff's costs of interpleader would be properly so paid. If, however, bankruptcy supervenes within the time during which the sheriff is ordered to hold the proceeds in suspense, the judgment creditor no longer gets his debt or his costs of judgment and execution or his interpleader costs out of the proceeds. The sheriff, after deducting his own costs of the execution, pays the balance to the official receiver. This being the general law, two questions arise here.

(1.) Does the order of the King's Bench Master or does the allocatur operate as res judicata so as to prevent the application of the ordinary rule?

(2.) If it does not so operate, can the sheriff claim his interpleader costs as "costs of the execution"?

As to (1.), the orders of the King's Bench Master contain three directions as to costs—first, that the sheriff out of the proceeds pay his own costs and charges; second, that he pay the judgment creditor's costs of the application; and, thirdly, that he pay three guineas, one guinea in each action, to the claimant. That part of each order which apparently directs the sheriff to pay himself was not an order which he had to obey. To borrow the language of Justinian in an analogous case, "Magis consilium est quam mandatum": Instit. lib. iii., tit. xxvi. 6. That part of the order which relates to the

1910

ROGERS, *In re.* SUSSEX (SHERIFF), *Ex parte.*

Phillimore J.

judgment creditors' costs can only have been intended to operate unless bankruptcy supervened. It, with the allocatur, may perhaps be taken as an adjudication that these costs were properly incurred and not inflamed in the way I have suggested, and therefore the proper costs of execution to be recovered with the other costs of the execution (if they can be recovered) against the goods. The third part of the order directing one guinea to be paid to the claimant gives rise to more difficulty. It is a small matter and perhaps passed per incuriam. It may not have been noticed, but it was wrong as against the judgment debtor, who was not before the Master on this application. As against him and as against the official receiver this cannot be treated as res judicata. The bankruptcy taxing Master was therefore right in taxing off the items of one guinea. He was also right in taxing off the item of 8*l.* 18*s.* 8*d.* execution creditor's costs. These are not sheriff's "costs of the execution" which alone the sheriff is entitled to deduct before he hands the balance to the official receiver. The fact that they had been ordered and taxed by the King's Bench Master only determined that they were proper costs for the judgment creditor to recover with his judgment debt. Lastly come the sheriff's costs, 11*l.* 18*s.* These stand on a different footing. The question as to them is whether they are "costs of the execution." I think they are. Various cases were cited. *In re Harrison* (1), which was cited against the sheriff, rather makes for him. There, being in possession pending interpleader proceedings, he was deprived of possession money after he had notice of a receiving order. Rightly, because he should have delivered the goods to the official receiver, but no one contested his right to possession money till that date, though his prolonged possession was due to the interpleader proceedings. *In re Levy* (2) shews that the judge's view was that prima facie the sheriff should have his costs of possession pending interpleader. *In re Hurley* (3), where the sheriff was allowed possession money for remaining in possession without selling at the joint request of creditor and debtor, explains and fortifies what I have been saying, while *In re English & Ayling* (4)

(1) 10 Mor. 106.
(2) 7 Mor. 125.
(3) (1893) 10 Mor. 120.
(4) [1903] 1 K. B. 680.

does not decide to the contrary. Wright J. there says that the costs of keeping possession after the proper time for sale or other completion of the execution are not costs of the execution as against the creditor unless the creditor has consented to the prolongation of the possession, and that when the sheriff has been in possession more than twenty-one days this becomes an act of bankruptcy, and the trustee in bankruptcy is thenceforward to be deemed the creditor, and he did not consent to the prolongation of possession. Therefore this prolonged possession money was not part of the costs of the execution. These cases are upon possession money. The same principle applies to the sheriff proper and necessary costs of interpleading, to deprive him of which would operate very unjustly. Therefore this objection by the sheriff to the taxation was right, and I allow it, and upon the whole I think he should have his costs of the application to review.

I have two observations to add. (1.) The official receiver made, I think, another mistake, arising again out of his misconception of s. 11 of the Act of 1890, in thinking he had to tax the bill of the auctioneer whom the sheriff employed. Such an auctioneer does not come within s. 73 of the Act of 1883. (2.) The case of *Smith* v. *Darlow* (1) seems to be cited in the Annual Practice at p. 176, ed. 1911, as an authority for a point which did not arise in the case. This mistake does not occur in the Yearly Practice.

Solicitors: *Palmer & Bull; Solicitor to the Board of Trade.*

(1) 26 Ch. D. 605.

H. L. F.

C. A.

1910
Oct. 13, 14, 18.

[IN THE COURT OF APPEAL.]

CORY & SON, LIMITED *v.* FRANCE, FENWICK & CO., LIMITED.

Employer and Workman—Workmen's Compensation—Accident to Workman—Negligence of Employer and also of Third Party—Compensation recovered by Workman—Action for Indemnity by Employer against Third Party—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

Where an accident, in respect of which an employer has been compelled under the Workmen's Compensation Act, 1906, to pay compensation, was caused by the combined negligence of another person and of his own servants, the employer cannot maintain an action for indemnity against that other person under s. 6 of the Act.

A steamer belonging to the plaintiffs was approaching a staith, which was being used by and under the control of the defendants, for the purpose of taking a cargo of coal there from the defendants. Two workmen employed by the plaintiffs were in attendance on the steamer in a boat for the purpose of taking a rope from the steamer to the staith. In consequence of the plaintiffs' servants in charge of the steamer complying with a direction given by the staith-master employed by the defendants, the propeller was set in motion, with the result that the boat was upset, one of the workmen being drowned and the other injured. The plaintiffs, having been compelled to pay compensation in respect of the accident under the Workmen's Compensation Act, 1906, brought an action against the defendants for indemnity under s. 6 of the Act. A commissioner of assize by whom the action was tried found that both the staith-master and those in charge of the ship had been negligent, the former in giving the direction that he did, and the latter in complying with it, without ascertaining whether it was safe to do so, and that their combined negligence had caused the accident; and upon these findings he held that the plaintiffs, through their servants, having been guilty of negligence which contributed to the accident, could not maintain the action:—

Held, that the judgment of the learned commissioner was correct.

Question considered, whether it was the proper inference from the facts proved in evidence that negligence on the part of the staith-master was an effective cause of the accident.

Appeal from the judgment of Scrutton, K.C. (now Scrutton J.), sitting as a commissioner of assize at Durham, in an action tried by him without a jury.

The action was brought by the plaintiffs for indemnity under the Workmen's Compensation Act, 1906, s. 6, against

compensation which they had been made liable to pay in respect of an accident to workmen under that Act. (1)

The before-mentioned accident occurred in the following manner. A steamer belonging to the plaintiffs, called the *Highgate*, was being towed up in ballast to a staith on the river Wear, which was then being used by and under the control of the defendants, to take a cargo of coal from the defendants. She was coming up against an ebb tide, stern first, with one tug ahead of her, and another astern of her. There was a pilot on board, though there was no obligation for her to take a pilot. A boat was in attendance on her, in which were two workmen employed by the plaintiffs, for the purpose of taking a rope from her to the staith. It appeared to be the practice that a man named Mitchell, employed by the defendants as staith-master, should in such cases give directions as to the particular spout at the staith under which the vessel should go. The boat came to the port quarter of the *Highgate* somewhere under the counter, and was receiving a rope from those on board, when Mitchell gave the direction "Slow ahead, helm aport." According to the usual practice the captain and pilot were then on the bridge of the steamer, from which they could not see the boat, and the second officer was stationed aft to see that all was clear. The pilot passed the direction given by Mitchell on to the captain, who gave orders in accordance with it, without inquiring whether the propeller was clear. The captain said in giving

(1) The Workmen's Compensation Act, 1906, s. 6, provides as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1.) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2.) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

evidence that it was the practice in such cases to obey the directions of the staith-master, unless it would obviously be dangerous to do so. The second officer said in giving evidence, in effect, that he thought there was some danger to the boat, but he did not signal to the captain, because he considered that Mitchell was in charge of the ship, and he deferred to his judgment because he was in full view both of the boat and the propeller, and in a position to see more about it than he himself could. The engines were started in pursuance of the captain's order, with the result that the boat was sucked on to the propeller and upset, one of the boatmen being in consequence drowned, and the other seriously injured. The plaintiffs having been made liable to pay compensation in respect of the accident to the workman who was injured, and the dependants on the workman who was drowned, brought the action as above mentioned.

The learned commissioner found that both the staith-master and those in charge of the ship had been guilty of negligence which caused the accident, the former in giving the direction which he did, and the latter in complying with it, without ascertaining whether it was safe to do so; and he held that the plaintiffs, through their servants, having been guilty of negligence which contributed to the accident, could not maintain an action for indemnity against the defendants under s. 6 of the Workmen's Compensation Act, 1906. He therefore gave judgment for the defendants.

J. R. Atkin, K.C., and *A. Adair Roche*, for the plaintiffs. Upon the finding of the learned commissioner that Mitchell was guilty of negligence which caused the accident, the case comes precisely within the words of s. 6 of the Workmen's Compensation Act, 1906, as being a case in which an injury for which compensation was payable under the Act was caused under circumstances which created a legal liability in some person other than the employer, namely, the defendant company, to pay damages in respect thereof; and consequently the defendants were liable to indemnify the plaintiffs against the compensation which they had to pay. If the words of an enactment are

absolutely clear and unambiguous, as it is submitted that the words of s. 6 are, it is not for the Court to entertain any question as to the justice or otherwise of the result produced by them. The defendants were clearly liable at law for damages in respect of the accident in question. The learned commissioner was right upon the evidence in finding that the negligence of Mitchell caused the accident. The evidence shewed that he really was the person in charge of the operation of bringing the ship to the place where she was to lie at the staith, and whose duty it was to direct that operation. He was in a better position than any one to see the situation of the boat in relation to the propeller. It was the duty of those in charge of the ship to carry out his orders, and they were entitled to assume that those orders did not involve danger to the boat, and to carry them out, unless there was obvious danger in so doing. Assuming that there was, as the learned commissioner found, negligence on the part both of Mitchell and the ship's officers, the negligence of the former was the effective cause of the accident. Even if both the negligence of Mitchell and that of the ship's officers must be taken to have been effective causes of the accident, the words of s. 6 are satisfied, and the plaintiffs are entitled to be indemnified by the defendants. The plaintiffs could not have been held liable in an action for damages by the workmen on account of the doctrine of common employment: *Hedley* v. *Pinkney & Sons' Steamship Co.* (1) [They also cited *The Bernina* (2); *Hughes* v. *Macfie* (3); *Engelhart* v. *Farrant* (4); Clerk and Lindsell on Torts, 5th ed., p. 148; Beven on Negligence in Law, p. 88.]

Scott Fox, K.C., and *M. P. Griffith Jones*, for the defendants. The doctrine of common employment has no bearing on this case. There would have been a right of action against the employers for damages under the Employers' Liability Act, 1880, s. 1, sub-s. 2. Upon the evidence in this case the defendants were entitled to judgment. The evidence does not shew any negligence on Mitchell's part. He was not in the position of a harbour-master having statutory powers, but was merely the

(1) [1894] A. C. 222.
(2) (1888) 13 App. Cas. 1.
(3) (1863) 2 H. & C. 744.
(4) [1897] 1 Q. B. 240.

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

servant of the staith owners, who were concerned with the ship-owners in a common enterprise. He was not concerned with the navigation of the ship. His business was merely to give directions as to where the ship was to lie at the staith. He was entitled to assume that, before carrying out his directions in that behalf, those in charge of the ship would ascertain that they could safely be carried out. If he was guilty of any negligence, the proximate cause of the accident was not that negligence, but that of those in charge of the ship in carrying out his directions without ascertaining that they could be carried out without danger to those in the boat.

It may well be contended that what happened in this case was a mere accident, and not due to any one's negligence, and that it was the business of the boatmen in attendance on the operation of bringing a ship to the staith to look out for themselves, and keep out of the way of the propeller. If there was any negligence, it was that of those in charge of the ship.

Assuming, however, that there was negligence on the part of Mitchell which caused the accident, negligence on the part of the plaintiffs' servants in charge of the ship contributed to cause it. But for their negligence, any negligence on Mitchell's part would have been innocuous. That being so, upon the true construction of s. 6 the action is not maintainable. The general language of s. 6 must be limited so as to exclude a case in which the employer is equally liable with a third person for negligence which caused the accident. It cannot have been the intention of the Legislature, where both the employer and a third person have been wrong-doers, to impose an obligation on the latter to indemnify the former. The creation of such an obligation is quite foreign to the object of the Act, which was to benefit the workman, not the employer. The preliminary words "creating a legal liability in some person other than the employer" ought to be read as confined to a legal liability in that person alone, and as not including a case where the circumstances create a legal liability for damages in a person other than the employer and the employer himself. The section gives not merely a right to contribution, but a right to complete indemnity. It would be wholly unjust and unreasonable to construe it as giving one

wrong-doer a right to complete indemnity from another wrong doer where the former is equally, or possibly more, to blame for the accident than the person from whom he is claiming indemnity. Where one interpretation of a statute will produce a manifest injustice or absurdity, the Court is entitled, if any other interpretation of it is reasonably possible, to give it that interpretation. [They also cited Maxwell on the Interpretation of Statutes, 4th ed., pp. 121, 285, 311, 344, 380; *River Wear Commissioners* v. *Adamson* (1); *The Calliope*. (2)]

A. Adair Roche, for the plaintiffs, in reply. It is contended that the effect of the evidence is that Mitchell was by contract between the plaintiffs and the defendants put in the position for this purpose of a statutory harbour-master, and that he was in control of the operation of bringing the ship to the staith. That being so, it was natural that the second officer should defer to his judgment, he being familiar with the place and operation, and situated where he could see in what positions the boat and the propeller were in relation to one another.

If the defendants' contention as to the construction of the statute is correct, and, therefore, sub-s. 2 of s. 6 does not apply to a case where the employer's negligence contributed to the accident, it would follow that sub-s. 1, which prevents the workman from recovering both compensation and damages, would not apply, and the workman could in a case like the present recover both from his employer and the third party. The words "all questions as to the right to and amount of compensation" &c. in sub-s. 2 are satisfied by supposing a case in which there was an express contract alleged between the employer and the third party excluding the right to indemnity, or a case in which there was a question whether the employer's conduct subsequent to the accident had not disentitled him to claim indemnity. [He cited *Reney* v. *Kirkcudbright Magistrates*. (3)]

VAUGHAN WILLIAMS L.J. I think that we ought to affirm the decision of the learned commissioner, and dismiss this appeal,

(1) (1877) 2 App. Cas. 743.
(2) (1889) 14 P. D. 138; [1891] A. C. 11.
(3) [1892] A. C. 264.

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & Co., LIMITED.

Vaughan Williams L.J.

though I do not agree in all respects with the inferences which he appears to have drawn from the facts.

In this case the plaintiffs are the owners of the steamship *Highgate*, which on January 13, 1909, was being berthed at a private staith on the river Wear belonging to the defendants. The action is brought under the provisions of s. 6 of the Workmen's Compensation Act, 1906, by the plaintiffs, who were employers against whom compensation had been recovered in respect of an accident which happened to two boatmen, who were workmen in the plaintiffs' employ, to obtain indemnity from the defendant company against the compensation which the plaintiffs have had to pay, on the ground that the defendant company is a person other than the employer in whom the circumstances under which the compensation has become payable created a legal liability in respect of the accident on the wharfingers to the boatmen. The learned commissioner gave judgment for the defendants, although he has found as a fact that one Mitchell, a servant of the defendants, was guilty of negligence in giving orders, compliance with which caused the injury that the workmen suffered, one being killed and the other injured; and he has further found that there was, to use the words of s. 6 of the statute, a "legal liability in some person other than the employer," namely, the defendant company, "to pay damages in respect thereof," and, that being so, there was a good cause of action in respect of the accident against the defendants. He has, however, further found that the officers of the ship were negligent. He says that there is evidence, and it is common knowledge, that the second officer is placed aft for the very purpose of seeing that the propeller is clear before it is started; and that there is evidence, and it is common knowledge, that the captain and the pilot on the bridge should get a hail from aft that all is clear before they start the propeller. He says that in this case the officers started the propeller without taking any steps on their own account to ascertain whether it was clear, although they could not see the propeller or the boat, and the second officer, seeing the boat, thought there was some danger, but did not mention it. The learned commissioner says: "I think that they were guilty

of negligence contributory to the accident, and I therefore think that, if the shipowners had sued the wharfingers, alleging negligence on the part of their servant Mitchell in the performance of a contract between them, and claimed the damages that they had to pay to third parties in consequence of that negligence, it would have been an answer on the part of the wharfingers to say 'your own negligence contributed to the damage.'" He further says: "I have considered whether this argument of Mr. Scott Fox was right, that this was no order by Mitchell, but a suggestion or information, to use the language in the *Calliope Case* (1), on which the master must use his own judgment. I think that it does amount to an order." On this finding of fact, that both the shipowners and the wharf owners were guilty of negligence contributing to the accident as proximate cause thereof, the learned commissioner exonerated the defendants from liability, holding that, on the construction of the statute, it is open for a person when the employer sues him to say "you cannot sue me because the relations between us are such that I am not liable to you for this amount."

With regard to the construction of the statute, I entirely agree with him. I think that he selected rather an unfortunate example, in taking, as he did, as an example the case of a contract between the shipowners and the staith owners, exonerating the latter in case of future accident; but, apart from that, I agree with the conclusion that the plaintiffs here are not entitled to take advantage of the section which enables the employer, to use a convenient phrase, to stand in the shoes of the workman in respect of the recovery of damages from a third person. I shall say a word or two presently about my reasons for taking this view, but I wish in the first instance to deal with this case independently of the construction of sub-s. 2 of s. 6.

In my judgment, when there is a case in which a plaintiff is seeking to recover—which is not this case—against two persons for a joint tort by reason of their negligence, it is not sufficient for him to prove that there has been negligence on the part of either of the defendants, in order to succeed in the action. In my judgment he has always to prove that the negligence of which

(1) 14 P. D. 138; [1891] A. C. 11.

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Vaughan Williams L.J.

the defendant is proved to have been guilty was a proximate cause of the injury which is complained of in the action. In considering what is a proximate cause, you may often have to ask the question which was asked in the cases of *Rigby* v. *Hewitt* (1) and *Greenland* v. *Chaplin* (2), namely, was the negligence which was proved against the defendant of such a character that the consequences which followed might reasonably be expected to result under ordinary circumstances from such misconduct? I am going to quote from the words of Pollock C.B. in *Rigby* v. *Hewitt*. (1) He is laying down this, not as a proposition of law involved in the judgment, but in order to introduce the proposition upon which he is going to found his judgment. He says: "I am, however, disposed not quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct"; and, when the learned Chief Baron delivers his judgment in *Greenland* v. *Chaplin* (2), which was delivered on the same day as that in *Rigby* v. *Hewitt* (1), he says: "I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated." I do not myself suppose that, although, when these propositions were originally laid down, they were not intended as positive judgments, but as opinions of the learned judge, there would be any doubt nowadays as to their accuracy. When I look at Addison on Torts, which was edited by the late Mr. Justice Cave, I see that he adopts in the text of the work the views expressed in those two cases which I have just cited. (3)

In the present case I have already given a statement of the facts, and the view which the learned commissioner took of the

(1) (1850) 5 Ex. 240.
(2) (1850) 5 Ex. 243.
(3) See Addison on Torts, 7th ed., p. 55.

duties of these people. When he deals with the ship's officers, he makes it plain that, in carrying out the direction, or order, or wish—I do not care which you call it—expressed by Mitchell, the servant of the staith-owners, there was a course of business laid down for the very purpose of avoiding accidents. There is the second officer, who is placed where he is for the very purpose of seeing, as far as he can, whether it is safe, and then his directions are passed to the pilot and from him to the captain. Each of these persons has a duty to perform. In my view Mitchell had a right to suppose, and it was really his duty to suppose, that the order which he was giving would not be carried out unless the officers of the ship, according to the practice in question, had first satisfied themselves, either by communication with the second officer or otherwise, that it was safe to carry out the order. In my opinion, under these circumstances an action brought by the boatmen against the owners of the ship would have been a successful action, as far as the ship was concerned. I think that the shipowners by their negligence, the negligence of the officers of the ship, were the primary or proximate cause of the accident. I think that but for the negligence of those officers the mistake, if it was a mistake, of Mitchell, in giving the direction which he did, would not have given the boatmen a good cause of action against the staith owners: in other words, I think that, under those circumstances, it would not create a legal liability in the staith owners within the words of s. 6, sub-s. 1. One can also, in my judgment, look at this case from the same point of view as the Court did in the case of *The Calliope*. (1) Consequently, in my opinion, the act which Mitchell did here was a direction—or whatever you like to call it—of such a character that he had a right to suppose that it would not be carried out without the ship's officers first ascertaining that it was safe to carry it out. In my view the ship's officers did not do so, and this direction given by Mitchell was not the proximate cause of the accident which happened to these unfortunate boatmen. I do not think I need say any more as to the facts. Of course, if my judgment of the facts is right, it absolutely disposes of the case.

(1) 14 P. D. 138; [1891] A. C. 11.

C. A.
1910

CORY & SON, LIMITED v. FRANCE, FENWICK, & CO., LIMITED.

Vaughan Williams L.J.

But I have already referred to the construction of the words of the section, and I wish to say a word or two as to the reasons why I agree with the view taken as to that by the learned commissioner. I think that in the preliminary part of this section, when it speaks of a "legal liability to pay damages in respect thereof," that is to say in respect of the injury which is the subject of compensation, it is speaking of the circumstances which would give a good cause of action by the workman against the wrong-doer. As I read the section, it is quite plain that, in providing first for the workman not being able to recover both compensation and damages, the Legislature is anxious, because it thinks it just, that the wrong-doer who has by his wrong action brought about the result shall not get off scot free; and I think that the test prima facie to apply is the answer to the question, Would the workman have a good cause of action against this person other than his employer? But the Legislature do not go on to say that the remedy of the employer shall be by the trial of an issue whether or not the circumstances disclose as against the third person a good cause of action by the workman. The sub-section says: "if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by 'action,' or, by consent of the parties, by arbitration under this Act." It seems to me that the use of that word "action," in defining how the final remedy of the employer who has been compelled to pay compensation is to be enforced, shews that the defendant may set up matters which would be no answer to the workman, if he sued, but are an answer to the employer who is seeking to enforce his remedy over. I think that one may deal with the construction of the section on this limited ground. Mr. Scott Fox has cited a very large number of passages from Maxwell on the Interpretation of Statutes, and I will not go through those again, but I think that the principles there laid down do shew that, if the Court arrives at the conclusion that the intention of

the Legislature, in using these general words, could not have been that an employer, who has been a party to, and may have been the principal party to, the negligence which has brought about the injury to the workman, should have a right of action for indemnity against the person who, for convenience here, I will call his joint tortfeasor, it may construe the section accordingly.

I think that upon both these grounds, namely, that the servant of the defendants was not guilty of any negligence which was the proximate cause of the accident, and secondly that on the proper construction of the statute we ought not to hold that it gives one of two joint wrong-doers a right of action for indemnity against the other wrong-doer, the judgment of the learned commissioner was right, and therefore the appeal should be dismissed.

BUCKLEY L.J. I also am of opinion that this appeal should be dismissed. For the purpose of the first part of my judgment, I will assume that the facts shew that both the plaintiffs and the defendants were guilty of negligence, so as to create in them a legal liability to pay damages in respect of the accident. On that hypothesis, I propose, in the first instance, to consider whether s. 6 of the Act of 1906 applies or not: in my opinion it does not. The section uses the words "some person other than the employer." For brevity, I will call that person "a stranger." The first question for consideration, I think, is whether the section is to be read as if it were "circumstances creating a legal liability in a stranger," or as if it were "circumstances creating a legal liability in a stranger, or in the employer and a stranger." The true construction, in my opinion, is that the latter case is not included. My reasons are as follows. The section goes on in sub-s. 1 to provide that, in the state of facts mentioned in the preliminary words, "the workman may take proceedings both against that person," that is the person whom I have called "a stranger," "to recover damages, and against any person liable to pay compensation under this Act for such compensation." If the preliminary words bore the meaning which I think they do not bear, you would expect to find there

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Buckley L.J.

"the workman may take proceedings both against that person or against that person and the employer to recover damages and against any person liable to pay compensation under this Act for such compensation"; but you do not find those words. All that appears to be contemplated as the result which is to be dealt with, if the preliminary words apply, is that there is to reside in the workman a right to take proceedings for damages against the stranger and a right to take proceedings for compensation against the person liable under the Act to pay compensation. This will of course be or include the employer.

The history of this section of the Act of 1906 is as follows. Sect. 6 of the Act of 1897 had provided that, under circumstances such as are mentioned in each section, "the workman may at his option proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both." The object of s. 6 of the Act of 1906 was to alter that statutory law, and to provide that the workman may take proceedings both against that person to recover damages and against the employer for compensation, but subject to the provision that he may not recover both damages and compensation. Looking back then at s. 6 of the Act of 1897, under that section, as I have said, the workman is entitled to take proceedings either for damages or compensation, but not for both. That section went on thus, "and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." It seems to me impossible to suppose that the Act of 1897 had intended to provide that, if there was a legal liability for damages both in the stranger and in the employer, there should be a right in the employer to call upon the stranger to indemnify him for consequences which were due as much to the act of the one as to the act of the other. The same consideration arises in relation to the Act of 1906.

The second reason why I think that this case is not within the section is as follows. If the preliminary words of the section are satisfied, then the person by whom the compensation was paid is to be entitled to be indemnified by the person so liable to pay damages as aforesaid. Therefore, if a case where there is a

legal liability for damages in the employer and a stranger does come within the section, the effect of the Act is that, as between those two parties, both of whom are to blame, the one shall bear the whole of the onus to the indemnity of the other. That is a construction which I think highly improbable. Upon these grounds I think the section is confined to a case where there is a legal liability to pay damages in a stranger to the exclusion of a case where there is a legal liability to pay damages in a stranger and the employer himself.

But further, for the purpose of construing the section, I am now going to assume that the view which I have expressed as to the meaning of the preliminary words of the section is wrong, and that they are satisfied, if there is a legal liability to pay damages in a stranger and the employer. Under those circumstances, sub-s. 2 provides that the person called upon to pay the compensation, the employer, "shall be entitled to be indemnified by the person so liable to pay damages as aforesaid"—i.e., indemnified by the stranger—and then follow these words, "and all questions as to the right to and amount of any such indemnity shall" be determined in a particular way. So that, assuming that the preliminary words of the section are satisfied, sub-s. 2 contemplates that there still remains a question whether there is any right to indemnity.

Now suppose the facts are that both parties, the stranger and the employer, have been negligent, and are liable at law for damages. These words seem to me to contemplate that there still remains a question whether there is or is not a statutory right of indemnity. The statutory right of indemnity does not, therefore, arise in every case. It was conceded in argument, and in fact the contrary could scarcely be contended, that, if by contract the right to indemnity has been abandoned, it cannot be enforced. Equally it seems to me that, if the facts are such that, as between these two parties, it is not just that the one should be called upon to indemnify the other, then that question as to the right to indemnity is a question which is preserved by the last words of sub-s. 2.

For these reasons therefore, upon the construction of the section, I arrive at the conclusion that, even if there was legal

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Buckley L.J.

liability in both the parties, the shipowners cannot sue the staith owners for an indemnity under any statutory right to indemnity.

But, secondly, on totally different grounds, it seems to me that the appeal equally fails. The facts were that the ship, in approaching the staith, did a particular act, namely, set the propeller in motion, with the result that one man unfortunately was killed, and another man was injured. In respect of that accident compensation has become payable and has been paid. The question is whether the plaintiffs have a right to an indemnity in respect of that compensation. Now, whose act of negligence was it that caused the accident? Mitchell, the staith-master, was a person who, I have no doubt, was in a position to give orders in the sense that he was there for the purpose of saying to those in charge of ships going there to ship coals, "you must go under spout A and not under spout B: you must go here, not there." It was for him to say where the ship was to lie, but not to say, I think, what acts of navigation the ship was to execute for the purposes of obeying that which was in a sense his order. At this stage I ask myself the question, In whom lay the authority, and who exercised the authority, to cause the propeller to be actuated? Could Mitchell give an order which the engine-man would have to obey by pulling the lever and so turning the propeller? Was it Mitchell's order which did that? I answer "No." Mitchell's order appears to me to amount to this: "Do such acts as are proper in order that the ship may come to this place"; and then those in control of the navigation of the vessel, the pilot, the master, or whoever it was —I do not discriminate between those persons for this purpose— having received that which in a sense was an order, themselves, I think, owed the duty as navigating officers of deciding whether or not the circumstances were such that they could set the propeller in motion without doing injury. The cause of the accident was not Mitchell's order, but the course which the navigating officers took consequent upon that order. What happened was this. The second officer at the stern of the vessel could not actually see the propeller in the position in which he stood, but he could see the boat lying over the ship's quarter.

It was perfectly competent for him, and it was his duty, to form the best judgment he could as to whether the boat was in such a position that the propeller could be started without causing injury. He seems to me, upon his own evidence, to have surrendered his own judgment to that of Mitchell. The latter took the view that there was no danger likely to be incurred. The second officer was not entitled to rely upon that, and, if he did rely upon it, still the responsibility was with him; and, if there was negligence at all, the negligence was that of the person whose duty it was to see whether the boat was clear of the propeller. He did not see to it, with the unfortunate result that the accident happened. As between Mitchell and the persons controlling the navigation of the ship, therefore, it was the latter and not the former, I think, who were responsible.

Apart from this altogether, Mr. Scott Fox addressed to us an argument, which I think was largely suggested by myself, to the effect that this accident was not really due to the negligence of anybody; that the circumstances were such, according to the evidence, that everybody had good reason to believe that the boat lay at such a distance as that there really was no danger. It is not necessary to decide, and I do not decide on that argument. It seems to me that, if there was negligence which caused the accident, it was that of those in charge of the ship, not of Mitchell. If it was not that of Mitchell, then s. 6 does not apply, because the words "legal liability in some person other than the employer" are not satisfied.

Upon these grounds I think the appeal fails and should be dismissed.

KENNEDY L.J. In this case the learned commissioner came to certain conclusions of fact and certain conclusions of law. With regard to his conclusions of fact, the evidence in this case being oral, I should be extremely slow to come to any conclusion which differed from his. My view is that, on an appeal from a judge sitting without a jury, one ought, as the present Lord Chancellor has, I believe, pointed out, in the case of oral evidence, to act as one would with regard to the finding of a jury against whom no bias or mistake as to the evidence is alleged, and to

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Kennedy L.J.

respect his finding of fact, unless one can see that there has been some clear mistake, or misunderstanding. If I were free from that consideration, I might think that there was a good deal to be said, as Buckley L.J. has intimated, for the view that, on the evidence in this case, nobody ought to be blamed for the accident which happened. But the learned commissioner came to the conclusion that there was actionable negligence both on the part of Mitchell, the staith-master, and on the part of one or more of the plaintiffs' servants, who were in charge of the ship which was being navigated for the purpose of going to a berth at the staith; and I do not see any sufficient ground to justify me in coming to a different conclusion, either as regards the negligence of Mitchell, or that of the officers of the ship. To my mind it is my duty, not finding clear ground for so doing, not to differ from the learned commissioner as regards his findings as to the facts or the inferences which he drew from them.

I think, however, that it is due to the care with which the learned counsel on both sides have assisted us in this case, that I should state the view which, in agreement with the learned commissioner, I take as to the negligence of Mitchell. He was, no doubt, not a statutory harbour-master. He was not clothed with any statutory authority: he was the servant of the defendants, but a servant who, according to what was the well-known and unquestionable contract between the parties, would have the right to say to what spot the ship should be brought for the purpose of using the staith. When one is dealing with questions of negligence, it becomes important not to confuse one's mental vision by using the word "duty" otherwise than in relation to the person to whom it may be that obedience or care is due. The staith-master, as representing his staith owners, has his duties of contract; and so also the master, the pilot, and the mates have their duty to the shipowners as navigating officers. One must not confound those duties with the general duty which rests upon everybody, whether using a river or a road, to take care not to omit anything which is reasonably necessary for the protection of others, and to do nothing which will by reason of want of care inflict injury upon others. Mitchell, by the practice and usage, as the boatmen, and those on board the ship, no doubt,

knew, did in fact do a great deal more than give an order where the ship should go. He did not in this particular case give such a general order, but gave an order dealing with the question how, and not only with the question whither, she should go; because the order which he gave was "Slow ahead, helm aport," in other words, orders to engine and to helm. He said—and I think he gave his evidence very fairly—that he did expect that, under such circumstances as existed in this case, the master, and pilot, or whoever it was in charge of the navigation of the ship, would do as he told them to do, giving the best care and judgment at the moment. He says himself on his examination-in-chief, "If the ship is setting off from the quay on an ebb tide, I should give orders for the engines to go ahead on the port helm." His examination continues thus: "Question, 'What does the master do then?' Answer, 'The master sometimes carries the orders out, and sometimes not.' Question, 'How does he decide as to what action he shall take upon your orders or your direction?' Answer, 'He would naturally think that, in the place where I am standing, I would see the propeller, and everything was all clear.'" That is his own statement given to Mr. Scott Fox, as counsel for his employers, and given with a fairness which I think does the man great credit under the circumstances. But, if he had not said so, it would have been in conflict with the evidence of the rest of the competent witnesses in the case. Two pilots were called, namely, the pilot Meynell and another pilot named Gibbins. The former's evidence was as follows: "Question, 'Who tells you where you are to put the ships on the staiths?' Answer, 'The berthing master.' Question by the commissioner—'If he tells you to go ahead, if there is a barge or anything in front of you, do you go ahead?' Answer, 'No, not if I thought I was going to do any damage.'" Then he described what he did, which was in accordance with the well-known position of a pilot as defined by the authorities, namely, that of being the adviser of the captain. He was not a compulsory pilot, but it was his duty to advise the captain, and it was the captain's duty prima facie to take his orders. He was subsequently asked whether Mitchell was in a position to see anything in the vicinity of the propeller,

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Kennedy L.J.

and then he was interrupted by Mr. Scott Fox, the defendants' counsel, who said "Everybody knows he was." The result of this evidence seems to me to be that Mitchell did in fact give orders. The evidence of the witness Gibbins is to the same effect. It was as follows: "Question, 'When you get up to the staiths, who looks after what is done there?' Answer, 'Mr. Mitchell gives orders for the ropes to be taken ashore.' Question, 'Supposing the ship has to be towed, or manœuvred, who gives the order?' Answer, 'Mitchell, also with the tugs, he has the ordering of the tugs as well.' Question, 'Do you carry out his orders?' Answer, 'Yes.' Question, 'Of course, if you see there is no danger?' Answer, 'Of course I would not, if I saw danger in it.'" I should think that, the staith-master being a person accustomed to the working of a place of this kind in a narrow river, it is only right that those in charge of the ship should carry out his orders, except where they see, or have reason to believe, that he cannot be aware of facts which will create danger, and ought therefore to modify his order. Nobody, whether captain or pilot, has, in my view, a right under any circumstances, even when ordered by a harbour-master with statutory authority, blindly to do something when he knows the order is given in ignorance of a danger of which he is cognizant. But short of that, such a person cannot, I think, be said to be otherwise than reasonably careful, if he obeys the order given by the person conversant with the place, responsible to his owners for the care and management of the staith, and responsible, like every one else concerned in the operation going on, for seeing whether these boatmen might be in a position of danger. Put the converse case: Supposing pilot, captain, or second officer in this case had refused to obey the order and had not carried it out, and an accident had happened: would it not have been said that nothing could be more negligent than not carrying out the orders of the man who had the best opportunity of seeing what was the proper order to give? It seems to me that the view taken by the learned commissioner as to Mitchell's negligence was right.

But then it is said that, although Mitchell gave this order, it was not the proximate or effective cause of the accident. Different

views have been expressed as to that; and, as I understood Vaughan Williams L.J. to express a different view from that which I am taking, I am very likely wrong, but to my mind it was a proximate and effective cause of the accident. In using the word "proximate" one must be careful not to mix up the question of time with the question of causation. You may have a proximate cause, although something has intervened after the act which has caused the mischief. There are plenty of examples to shew that this is so. Further than that, in my judgment, it does not lie in the mouth of a person who cannot deny that he was an effective cause of the damage to say that there were also other effective causes of it. I will not refer in detail to the case of *Greenland* v. *Chaplin* (1), to which reference has already been made. The doctrine there acted upon is settled law, and has more than once been recognized, particularly in the case of *Clark* v. *Chambers* (2), where the judgment of Cockburn C.J. shews what are its proper modifications. He refers there to the passage which has been cited, and also to a similar passage in *Sharp* v. *Powell.* (3) In *Greenland* v. *Chaplin* (4) Pollock C.B. said: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." With that view of the law nobody would venture to quarrel; but, applying it to the present case, can a man, who admits that he expected that the captain would naturally carry out his order, say that he could not by any possibility have foreseen obedience to his direction, and could not, as a reasonable person, have anticipated that it would be carried out? I will not go in detail into the matter, but that is my own view, and these are the reasons why I think that the learned commissioner's conclusion on this question was correct. I do not think the law on the subject can be better stated for this purpose than it is by Mr. Beven in his book on Negligence in Law, 3rd ed., vol. 1, p. 77. He

(1) 5 Ex. 243.
(2) (1878) 3 Q. B. D. 327.
(3) (1872) L. R. 7 C. P. 253.
(4) 5 Ex. 243, at p. 248.

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Kennedy L.J.

there says: "Again one person may be negligent, and, by the negligent or wilful act of another, the negligent act of the first may cause injury to a third; then a distinction is to be taken. If the first negligent act is not in its nature such that the second might be looked for, as a natural and probable sequence, then the first negligent person is not responsible. If the subsequent negligence is likely to follow from the antecedent negligence, then the first negligent person is liable; and the question must be left to the jury whether the first wrong-doer's act was the proximate cause of the plaintiff's injury. Even though the first wrong-doer may be liable, the second is not therefore discharged since each is liable for the total results of the joint wrong—that is where the consequences are not referable to the separate agency of each in their just proportions." Then at p. 78 he refers to the judgment of Cresswell J. in *Thorogood* v. *Bryan* (1) and the summing up of Maule J. in *Reg.* v. *Haines* (2); and, after quoting the words of Maule J., thus, "It is no defence for one who was negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them," he proceeds: "The distinction has been already indicated; it is between a cause and a condition." Then follows what I think myself to be a very good statement of the law: "If the conduct impugned is a cause, even though not the cause—in the sense of the sole cause of the accident—the author of it continues liable. But, if the first negligence has, so to speak, fallen dead, and is inoperative without the second agency working, the first negligence has ceased to be a cause; it has become a condition—the material with which the second chooses to work." I could not put the matter from my point of view better. We have here the principal witness Mitchell, whose conduct is in question, in effect saying "I expected the captain"—that is what he substantially means when he uses the word "naturally"—"to assume that I was giving a right direction: I agree that I was in the best position to see." There is no question therefore that he foresaw that the movement of the propeller might take place, and the question is whether he was not in a position to see what the danger was as well as, or even better than, anybody else.

(1) (1849) 8 C. B. 115. (2) (1847) 2 Car. & K. 368.

For these reasons I should not differ from the learned commissioner in the conclusions either of law or fact at which he arrived upon the question of negligence. If I were inclined to differ, it would be with regard to those in charge of the ship, because when you speak of the duty of the second mate to see that all is clear aft, and the duty of the captain to wait for the signal from aft, and the duty of the pilot to do the same, you are using the term "duty" in a sense which, as it seems to me, may be misleading. They had those duties, as navigating officers, towards the shipowners. As regards these boatmen, they had the special duty of persons who had to take care that these men were not injured when they might be injured by their carelessness; and it is exactly the same class of duty as Mitchell had: he had a duty to everybody concerned to see what would be the effect of what might reasonably be expected to be done in consequence of his order. Mitchell here was in a position to see; as he said, he had as good a view as anybody; and, if he said "it is quite safe: go on," I should hesitate somewhat myself under the circumstances before I found any of these officers guilty of negligence. The one as to whom there appears to me to have been most evidence of negligence is the second officer, who, no doubt, admits that he had some doubts whether it was safe or not, but he says that he had not quite such a good view as Mitchell of the propeller.

Now, accepting the findings of the learned commissioner as against both Mitchell and those in charge of the ship, there remains a difficult question with regard to the law. Upon the whole, I think that the defendants are right on the question of law. It seems to me, in dealing with a section which, as regards this case, is one giving a right to indemnity, that, if I can adopt any reasonable construction which will prevent the result of a man getting an indemnity in respect of damage to the production of which he has himself materially contributed, I ought to adopt that construction. The plaintiffs have been found by the learned commissioner to have been one effective cause, as Mitchell was another, of this accident. They claim to be indemnified for what they have paid by way of compensation under the Workmen's Compensation Act, 1906, in respect of the accident. It seems to me that nobody who helped to pass this Act of Parliament, which

C. A. 1910

CORY & SON, LIMITED v. FRANCE, FENWICK & CO., LIMITED.

Kennedy L.J.

makes an employer liable apart from all questions of negligence to make compensation in respect of an accident to a workman arising out of and in the course of his employment, could have intended by this section that, though the employer could have been sued, if not at common law, at any rate under the Employers' Liability Act, 1880, as being through his servants to blame for the accident, he should be able to go to another person whose servant has been guilty of negligence which in common with that of his own servants caused the accident, and demand an indemnity. There is nothing in the Act, as it appears to me, to prevent my taking this view. If necessary for this purpose, I think I should say that it is not unreasonable, having regard to the consequences of any other interpretation, to read the words "creating a legal liability in some person other than the employer" as meaning a legal liability which, as between the employer and the third person, is the sole legal liability. It has, I think, been pointed out by both the other members of the Court that a fair inference from the provisions of sub-s. 2 with regard to the determination of any question as to the right to and amount of the indemnity is that it includes the consideration of the question whether a party claiming indemnity is not disentitled to claim indemnity by reason of his being equally liable for the accident, just as in the case put by the learned commissioner of a contract by which the right to indemnity is excluded. I think on the whole that the section should be treated as applying only to cases in which the employer is liable only for compensation under the Act, and not as applying to cases where the employer himself is, through his own or his servants' negligence, responsible outside the Act jointly with the person from whom he claims indemnity, as having to some extent contributed to the injury to the workman who has been compensated.

For these reasons I agree with the judgment of the learned commissioner both as regards the inferences of fact which he drew, and as regards the view which he took of the construction of the section.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Deacon, Gibson & Co.*

E. L.

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) *v.* DA COSTA.

1910
Oct. 27, 28.

Marine Insurance—Reinsurance—"Open Cover"—Loss—Refusal to sign Policy—New Contract for Good Consideration—Contract for Sea Insurance not expressed in a Policy—Payment of Loss—Penalty—Stamp Act, 1891 (*54 & 55 Vict. c. 39*), *ss. 93, 97—Stamp Objection—Costs.*

The plaintiffs, an insurance company, by means of an "open cover" extending over a period of more than twelve months, reinsured with the defendant, an underwriter at Lloyd's, the risks which they had insured with respect to cargo to be carried in certain steamers during the period in question. The defendant having refused to sign the policy put forward by the plaintiffs in respect of a loss, for which they had become liable in the sum of 230*l.* under their original insurance, on the ground that the plaintiffs had not made to the defendant all the declarations that they should have made under the "open cover," it was verbally agreed that an independent person should be appointed to examine the plaintiffs' books, and that, if he certified that all the declarations had been made, the defendant would sign the policy in question and would pay the 230*l.* for the loss. The person appointed, after examining the plaintiffs' books, certified that all the declarations had been made, but the defendant refused to sign the policy and did not pay the 230*l.* In an action to recover 230*l.* as damages for a breach of the verbal agreement:—

Held, that the action was not maintainable, (1.) because if the defendant paid the 230*l.* he would be paying a sum of money upon a loss relative to sea insurance, which insurance was not expressed in a policy of sea insurance duly stamped, and the defendant would, therefore, be liable to a penalty under s. 97 of the Stamp Act, 1891; and (2.) because the verbal agreement was a contract for sea insurance, and, not being expressed in a policy of sea insurance, was invalid under s. 93 of the Stamp Act, 1891.

Hyams v. *Stuart King*, [1908] 2 K. B. 696, distinguished.

Held, also, that in the circumstances the defendant was not entitled to an order for the payment by the plaintiffs of the defendant's costs of the action.

Action in the commercial list tried by Hamilton J. without a jury.

The plaintiffs were a marine insurance company carrying on business at Copenhagen. The defendant was an underwriter at Lloyd's. On April 3, 1907, a firm of insurance brokers at Lloyd's, acting as agents for the plaintiffs, effected a reinsurance contract

1910

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) v. DA COSTA.

by way of "open cover" with the defendant on behalf of himself and certain other underwriters. The contract was open till December 31, 1908, upon cargo by the Roland Line steamers from the Continent of Europe to the West Coast of South America and back, and for an amount up to 500*l.* on cargo in any one steamer. From time to time, when the plaintiffs had an interest in cargo in a steamer of the Roland Line, they put forward declarations followed by policies of reinsurance in respect of that interest to the defendant, and the policies were duly signed by the defendant. In December, 1908, the plaintiffs put forward a policy upon cargo by the steamship *Lambert* for 230*l.* This steamship and cargo had already been totally lost by perils of the sea, and the plaintiffs on their original policy had become liable to pay 230*l.* for a total loss. The defendant refused to sign the policy upon the *Lambert* cargo upon the ground that the plaintiffs had failed to make all the declarations that ought properly to have been made by them under the cover. In the absence of a policy signed by the defendant the plaintiffs were unable to recover from the defendant by action the amount of their loss in respect of the *Lambert's* cargo.

In these circumstances it was orally agreed between the insurance brokers, on behalf of the plaintiffs, and the defendant that Lloyd's agents at Copenhagen should be requested to nominate some competent person to examine the books and records of the plaintiffs and ascertain whether all the declarations that ought to have been put forward under the cover had in fact been put forward; that if such person should certify that the declarations had been properly made, the defendant would sign the policy by the *Lambert*, would pay the 230*l.* for the loss, and would pay the fee charged for the investigation; but that if the said person should certify that the declarations had not been properly made, the plaintiffs would pay the fee charged by the said person, and the plaintiffs should have no further claim in respect of the loss upon the defendant.

In pursuance of this agreement a Mr. Gether, of Copenhagen was appointed to examine the plaintiffs' books and records, and on June 3, 1909, he certified that all the declarations which ought to have been put forward by the plaintiffs under the cover

to the defendant had in fact been put forward. Mr. Gether's fee for making the investigation was 10*l.*

The defendant did not pay to the plaintiffs either of the sums of 230*l.* and 10*l.*, nor did he sign the policy, and the plaintiffs claimed in this action to recover 240*l.* as damages for the defendant's breach of the oral agreement.

The defences to the action were, first, that owing to the manner in which the investigation had been conducted the certificate of Mr. Gether was not binding on the defendant; and, secondly, that the requirements of the Stamp Act, 1891 (1), had not been complied with. With regard to the first question, the learned judge came to the conclusion that, although it would have been better if the examination and investigation of the plaintiffs' books by Mr. Gether had been of a more exhaustive description, his certificate having been given bona fide was conclusive as to the result of the examination; and it is

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 91: "For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance."

Sect. 92: "(1.) For the purposes of this Act the expression 'policy of sea insurance' means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance."

Sect. 93: "(1.) A contract for sea insurance . . . . shall not be valid unless the same is expressed in a policy of sea insurance."

Sect. 97: "(1.) If any person—

"(*a*) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, ...

he shall for every such offence incur a fine of one hundred pounds."

1910

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) v. DA COSTA.

therefore unnecessary to refer further in this report to that branch of the case.

J. R. Atkin, K.C., and *F. D. MacKinnon*, for the plaintiffs. The contract sued upon is not a contract for sea insurance within the meaning of s. 93, sub-s. 1, of the Stamp Act, 1891. It is a contract to settle a dispute between the parties, and it is therefore one which need not be expressed in a policy of sea insurance. The Stamp Act, 1891, contains no definition of a contract for sea insurance, although by s. 92, sub-s. 1, the expression "policy of sea insurance" is defined. It is not disputed that at the time the contract was made a loss had already occurred, and the defendant clearly undertook by the contract that he would, in the event which has happened, pay 230*l.* Immediately the defendant refused to sign the policy the plaintiffs became entitled to sue for money due to them under the contract. No doubt the defendant also agreed, in order to regularize the position, to sign the policy. But he would not have satisfied the contract merely by signing the policy. It is possible that a different question might have arisen if the defendant had undertaken to sign the policy and then to pay upon the policy. But even then the contract would not have been for sea insurance. The true construction of the contract is that the defendant undertook that he would sign the policy, and further that he would pay 230*l.* in respect of the loss which had already happened. That was a promise to pay 230*l.* on an event not depending upon any question of sea insurance. There was a fresh consideration for the promise to pay the 230*l.* The promise to sign the policy is separate from that to pay the 230*l.*, and they are not dependent upon one another in any way. Even if the promise to sign the policy is void, there was fresh consideration for the promise to pay the 230*l.*, and it is therefore enforceable on the same ground as that on which a promise for fresh consideration to pay a bet can be enforced: *Hyams* v. *Stuart King*. (1)

Bailhache, K.C. (*Chaytor* with him), for the defendant. It is clear law that a person cannot be sued on a contract for sea insurance unless the contract is expressed in a policy of sea

(1) [1908] 2 K. B. 696.

insurance, and under s. 97, sub-s. 1, of the Stamp Act, 1891, if any person pays any sum of money upon any loss or contingency relative to any sea insurance, unless the insurance is expressed in a policy, he shall incur a fine of 100*l*. The law relating to marine insurance differs from the ordinary law of contract in that specific performance of a contract of marine insurance cannot be enforced nor damages for the breach of it given unless the contract is contained in a stamped policy. Sects. 93 and 97 of the Stamp Act, 1891, contain express statutory enactments to that effect. In the present case the promise to sign a policy cannot be dissevered from the promise to pay the loss, because under s. 97 of the Act the defendant would be liable to a penalty if he paid the 230*l*. As a verbal promise cannot be stamped, there is the same insuperable objection to paying upon it as there is to paying upon an unstamped slip.

F. D. MacKinnon in reply. This is not a contract by the defendant that he will pay on an unstamped policy if some third person finds that he is liable to pay; and if the defendant paid the 230*l*. he would not be liable to a penalty under s. 97, because it would not be a payment on a contingency relative to sea insurance. It is a contract for the settlement of a dispute made for valuable consideration. By the contract the defendant promised that if Gether certified that all the declarations had been duly made by the plaintiffs he would pay them 230*l*. It is, therefore, not a contract relating to sea insurance. None of the matters which would have to be proved by an assured seeking to recover a loss on a contract of sea insurance has to be proved by the plaintiffs in this case. It is immaterial that the original amount of the loss was 230*l*. and that the loss became payable on an invalid contract of sea assurance. There was fresh consideration given for the promise to pay the 230*l*., and the case is governed by the decision in *Hyams* v. *Stuart King*. (1) The plaintiffs are not seeking to recover a loss, but a sum of money the same in amount as the loss.

HAMILTON J., after stating the facts, continued :—It is contended for the defendant that if he were to pay the 230*l*. he would be

(1) [1908] 2 K. B. 696.

1910

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) v. DA COSTA.

Hamilton J.

in the position of having paid a sum of money upon a loss relative to a sea insurance, which was not expressed in a policy of sea insurance, and that he would therefore be liable under s. 97 of the Stamp Act, 1891, to a penalty of 100*l*. For the plaintiffs it is said that the oral contract upon which they are suing is not a contract for sea insurance within either s. 93 or s. 97 of the Stamp Act, but that it is a contract for a new consideration, analogous to contracts for new consideration to pay money lost on bets. There are, no doubt, cases in the books in which a person who owes money in respect of betting transactions has been held liable on a new contract or promise by him to pay in consideration of some forbearance extended to him by the other party. But I do not think that that class of case affords a true analogy to the present. At common law a promise to pay a bet was an enforceable contract; but the Gaming Acts, though not making betting per se illegal, provided that promises to pay bets should not be enforceable in law; that is to say, such a promise was deprived of all legal effect and became a mere nullity. If, however, the parties to a betting transaction enter into a new contract for good consideration, which contract is not in a form which has been declared by statute to be unenforceable, there is no reason in law why that new contract should not be enforced, the making of a bet not being itself illegal. In the present case, however, if the matter comes within s. 97, that which the defendant is called upon to do would, if he did it, be an offence punishable by fine, for, looking at the terms of this contract and the surrounding circumstances, I am of opinion that if the defendant were, in the terms of the contract, to "pay the 230*l*. for the loss," he would be paying a sum of money upon a loss relative to sea insurance, which insurance was not expressed in a policy of sea insurance duly stamped; that is to say, he would be doing that which is directly prohibited by s. 97; and if that is so, I cannot, by a judgment, order the defendant to do that which, if he did it voluntarily, would constitute an offence against the Act.

I am further of opinion that the contract sued upon is itself a contract for sea insurance, and not, as the plaintiffs contended, a new promise upon a good consideration. When the

plaintiffs put forward the policy for the defendant to sign he was in a position to say to the plaintiffs, "You are claiming to have been insured by me against a particular loss, which has occurred. If I give you a policy, I can put you to the proof of your interest, the exposure of the subject-matter of the insurance to, and its loss by, perils insured against, and the amount of the loss. Unless I sign a policy, you have no remedy against me, but I will make this concession. What I really want to know is something about our other business transactions, and if you will give me an opportunity of investigating those transactions, and if the investigation proves that there is nothing in my point, then I will at once sign the policy and pay the claim; but on the other hand if the result of the investigation is to prove that my view as to our transactions is right, then you agree not to make any claim in respect of this loss." I do not see how that differs from an insurance against this particular loss, subject to a special term, that there should be a reference to a certain person, and if he certified in one way no proof was to be required from the plaintiffs of any of the matters which they would otherwise have to prove to make good their claim, and if he certified in another way the loss was to be taken to have been paid. The effect of the contract was to insure the plaintiffs against a loss by sea perils, which it is true had already occurred, but that is immaterial. It was, therefore, a contract for sea insurance, and not having been expressed in a policy it cannot be sued upon; and the result is that there must be judgment for the defendant.

With regard to the costs, there is a general view amongst underwriters against the setting up of a stamp objection in insurance cases, and without questioning the wisdom of that which the Legislature has ordained, I think that the Court may properly adopt the same standard as has been adopted in practice by underwriters. In the case of *Home Marine Insurance Co.* v. *Smith* (1) Mathew J. acted upon that view, and gave judgment for the defendant, without costs, in circumstances somewhat similar to the present case. I am not prepared to say that there may not be cases in which non-compliance with the requirements of the Stamp Act may with propriety be relied on by an

(1) [1898] 1 Q. B. 829.

1910

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) v. DA COSTA.

Hamilton J.

underwriter as a defence. There may be cases where it may be necessary to do so in order to obtain information which the underwriter is entitled to, or to compel the assured to do that which he is bound to do. I can quite understand, although I am not prepared to say that it can be justified, that an underwriter may be prompted to plead the Stamp Act when he suspects the commission of a fraud, which he is unable to prove and unwilling to allege. In the present case too, without in the least intending to suggest that there has been any irregularity on the part of the plaintiffs in fact, I do not say that if in the first instance the defendant had bona fide doubts, as I assume he had, as to whether all the declarations had been made, he might not have been well warranted in taking up the strict legal position. But what he did was to enter into another arrangement, the intention being that in the event which happened he should settle the claim, and the position now is that he is seeking to throw upon the plaintiffs the burden of his dissatisfaction with the result of the investigation or with the manner in which it was conducted. I do not think that after entering into this arrangement it was fair to the plaintiffs for the defendant to rely on the Stamp Act, and by so doing he has caused them to incur unnecessary expense. In these circumstances I have come to the conclusion that I ought not to order the plaintiffs to pay the defendant's costs of the action.

Judgment for defendant without costs. (1)

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for defendant: *Coward & Hawksley, Sons & Chance.*

(1) The reporter has been informed that the defendant subsequently paid the amount of the loss.

F. O. R.

TAYLOR *v.* MARK DAWSON & SON, LIMITED.

1910
Oct. 28.

Factory—Employment of Children—Cleaning Machinery—Removing By-product —Spinning Machine—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 13.

By s. 13 of the Factory and Workshop Act, 1901, it is enacted that a child must not be allowed to clean in any factory any part of any machinery whilst the machinery is in motion by the aid of steam, water, or other mechanical power.

A child of twelve years was employed in removing, partly by hand and partly by means of a stick, from the rollers and top board of a cap-spinning machine for spinning woollen yarn, certain fluff formed in the course of spinning. If this fluff were not removed the rollers would become choked and the process would stop. The fluff was not mere refuse, but had a saleable value and was in fact sold:—

Held, that the child was cleaning machinery within the meaning of the enactment.

Case stated by the stipendiary magistrate for the city of Bradford.

An information was preferred on February 11, 1910, by the appellant, one of His Majesty's inspectors of factories, under s. 13, sub-s. 1, of the Factory and Workshop Act, 1901 (1), against the respondents for that they on January 25, 1910, were the occupiers of a certain factory in the city of Bradford, within the meaning of the Factory and Workshop Acts, 1901 and 1907, wherein one Mary Heap, a child, was allowed to clean a part of a cap-spinning machine whilst the same was in motion by the aid of steam, water, or other mechanical power.

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 13:

"(1.) A child must not be allowed to clean in any factory—(*a*) any part of any machinery . . . . while the machinery is in motion by the aid of steam, water or other mechanical power. . . . .

"(4.) A . . . . child allowed to clean in contravention of this section shall be deemed to be employed contrary to the provisions of this Act."

Sect. 137: "(1.) Where any person is employed in a factory . . . . other than a domestic factory . . . . contrary to the provisions of this Act, the occupier of the factory . . . . shall be liable to a fine not exceeding three . . . . pounds for each person so employed. . . . ."

Sect. 144: "(1.) All offences under this Act shall be prosecuted and all fines under this Act shall be recovered, on summary conviction, before a Court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts. . . . ."

1910

TAYLOR v. MARK DAWSON & SON, LIMITED.

The point for decision was whether or not the work being done by a child in the present case was cleaning a part of any machinery within the meaning of the section.

Upon the hearing of the information the following facts were admitted or proved in evidence. A child of twelve years was employed in the respondents' factory upon a cap-spinning machine for spinning woollen yarn. In the course of spinning, part of the material which is being spun is stripped off and becomes a species of fluff, which adheres to the revolving rollers and the top board. Unless the fluff is removed—necessarily while the machinery is in motion by the aid of mechanical power—the rollers become choked and the process stops. The fluff is not mere refuse, but has a saleable value and is in fact sold. It was part of the child's work to remove the fluff from the rollers and board, partly by the pressure of the hand and partly with the aid of a stick.

The appellant contended that the work done by the child was removing an obstruction from parts of the machinery, and that the child was therefore cleaning those parts within the meaning of the section. He referred to *Pearson* v. *Belgian Mills Co.* (1)

The respondents contended that the removal of the fluff was an essential part of the process of spinning, resulting in the acquisition of a valuable by-product, and was not cleaning machinery within the meaning of the section.

The stipendiary magistrate was of opinion (1.) that the removal of an obstruction from machinery was not necessarily a cleaning of the machinery; (2.) that the nature of the substance removed and the mode of its production caused the operation of its removal more closely to resemble a process of manufacture than a mere cleaning of machinery; (3.) that the appropriate remedy under the Act of 1901 in such a case, if the operation were dangerous, was under s. 79 and the following sections; and (4.) that the respondents had not committed a breach of s. 13. He accordingly dismissed the information.

The question for the opinion of the Court was whether upon the above statement of facts the stipendiary magistrate came to a correct determination in point of law.

(1) [1896] 1 Q. B. 244.

1910

TAYLOR v. MARK DAWSON & SON, LIMITED.

Rowlatt, for the appellant. The operation in which this child was engaged was that of cleaning machinery. The magistrate has gone wrong in treating the only piece of evidence to the contrary as being conclusive. The evidence to which he has given this undue importance is the fact that the fluff which the child was removing has a value of its own. But the real test is, why was it removed? If it was removed merely for its own sake, as, for instance, if it were directed into some receptacle which was emptied when it had become filled, the emptying of the receptacle would not perhaps be cleaning the machinery; but where, as here, the fluff is removed because it would stop the working of the machinery if it were not removed, then the process of removing it is a process of cleaning the machinery, and the fact that the fluff when removed has a market value is irrelevant and immaterial.

Bairstow, K.C. (*C. M. Barber* with him), for the respondents. The substantial question in this case is whether children are hereafter to be employed in the woollen yarn industry or not. There is no suggestion that the operation in which the child was engaged was a dangerous one; if it had been dangerous, the Home Secretary could have interfered under s. 79 and the following sections of the Act. But no steps have ever been taken under those sections although children have been doing this sort of work for years. The question whether the operation is a process of cleaning machinery is a question of fact. The magistrate was right in taking into account in deciding that question the fact that the fluff when removed had a value of its own. It is not mere refuse in the process of spinning, but comes into existence as a valuable by-product in that process. It is part of the manufacture, and its collection cannot properly be said to be a mere cleaning of the machine. In s. 152 of the Act a distinction is drawn between cleaning machinery and being engaged in work incidental to or connected with a manufacturing process. In this case the child was engaged in work of the latter description.

DARLING J. I think that this appeal must be allowed. I have come to this conclusion with regret, because what this child was doing was not dangerous and is commonly done, although this

1910

TAYLOR v. MARK DAWSON & SON, LIMITED.

Darling J.

enactment has been for many years in operation. It may be that this decision will prove a very inconvenient one; if so, it must be removed by legislation. Sect. 13 of the Act provides that a child must not be allowed to clean in any factory any part of any machinery whilst the machinery is in motion by the aid of steam, water, or other mechanical power. It is found in the special case that the child was engaged on a cap-spinning machine for spinning woollen yarn. The facts must be looked at. It is stated that "in the course of spinning, part of the material which is being spun is stripped off and becomes a species of fluff, which adheres to the revolving rollers and the top board." So far there is nothing to shew whether or not this fluff is an obstruction which must be cleared away, whatever its value may be, in order to prevent the machine from becoming clogged. But the case continues thus: "Unless the fluff is removed—necessarily while the machine is in motion by the aid of mechanical power—the rollers become choked and the process stops." The crucial question in this case is, why is this fluff removed? If it is removed because it is a valuable by-product, which, if not removed at the critical time, will deteriorate or suffer injury, then its removal is not for the purpose of cleaning the machine, but is for the purpose of preparing the product for sale. But it is not removed for that reason. It is removed because if it remains it will stop the machine. Now to remove that which, if not removed, will stop the machine and prove detrimental to it, is in my opinion to clean the machine.

The case proceeds thus: "The fluff is not mere refuse, but has a saleable value, and is in fact sold." It seems to me that those words contain the reason why the magistrate held that the process of removing the fluff was not cleaning the machine; but I cannot see that the value of the substance removed is the test. That which is mere refuse in certain operations may be extremely valuable in other circumstances. The value of the substance removed does not prevent its removal from being a process of cleaning.

I regret this decision because, if the operation in which this child was engaged were a dangerous one, the Home Secretary

1910

TAYLOR v. MARK DAWSON & SON, LIMITED.

could have intervened under ss. 79 et seq. of the Act, with a view of regulating or prohibiting it; and no steps have been taken in this direction. But the case has been brought before this Court, and we have no alternative but to decide it upon the plain words of the statute.

The appeal must be allowed.

PICKFORD and LORD COLERIDGE JJ. concurred.

Appeal allowed.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Indermaur & Brown, for R. Newton Rhodes & Hall, Bradford.*

W. H. G.

[COURT OF CRIMINAL APPEAL.]

1910
Nov. 5.

THE KING *v.* CRIPPEN.

Criminal Law—Trial for Murder—Illness of Juryman—Temporary Absence from Court—Custody of Juryman—Rebutting Evidence on behalf of Prosecution—Admissibility.

The rule that the jury must not separate during a trial for murder does not mean that in no circumstances must they physically part from one another. The rule is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave the rest of his fellows.

On the second day of a trial for murder a juryman became ill and was taken out of Court, but not out of the building, accompanied by two medical men and a Court usher, to a space at the bottom of the building at the back of the Court where there was open air and to which the public had no access. After a consultation between the medical men, one of them returned into Court and gave an opinion as to when the juryman would probably recover. The Court then adjourned for a short time, and the medical man was sworn to take charge of the juryman during the adjournment. He then returned to the juryman, and the two medical men, a constable, and the usher remained with him in the open air for about three-quarters of an hour. The juryman then rejoined his fellows, the usher having been with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury during the

1910

REX v. CRIPPEN.

adjournment for that night, but was not sworn for the particular purpose of taking charge of the juryman who became ill on the second day. During the whole time the juryman was absent no one spoke to him about the trial. The medical men only spoke to him, and no one else had an opportunity of doing so. On the way to the open air less than a dozen persons had to be passed, and the juryman was in a state of collapse and was in such a condition as to be quite unable to communicate with any one :—

Held, that it was not necessary that the usher who conducted the juror to the open air should be sworn as a Court bailiff to take charge of him upon that occasion, that nothing was done which was not justified in law, and that therefore there was no ground for quashing the conviction.

Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter in the discretion of the judge at the trial.

Semble that where the judge at the trial allows rebutting evidence to be given the Court of Criminal Appeal will not quash a conviction upon the ground that it does not agree with the way in which the judge at the trial exercised his discretion, unless there is something in the rebutting evidence in the nature of a trap, which results in an injustice to the prisoner.

APPEAL by the prisoner from his conviction.

The prisoner was tried at the Central Criminal Court before Lord Alverstone C.J. on October 18, 1910, and following days for the murder of his wife. The jury found him guilty, and he was sentenced to death. He appealed from his conviction upon the grounds (inter alia)—

(1.) That one of the jurymen, after the prisoner had been given in charge of the jury, absented himself from the rest of the jury without the juryman or the rest of the jury being given in charge of the proper officer of the Court.

(2.) That the evidence of James Chilvers, a witness for the Crown, was wrongly admitted.

The facts so far as material to the two grounds of appeal to which this report relates were as follows :—

On October 18, 1910 (the first day of the trial), two ushers of the Central Criminal Court were sworn as jury bailiffs to take charge of the jury during the adjournment.

The form of oath administered to them was as follows :—

"I swear by Almighty God that I will well and truly keep this jury during the adjournment of the Court in some convenient

and private place with suitable and proper accommodation. I will not suffer any person to speak to them, neither will I speak to them myself touching the trial had here this day, without the leave of the Court."

On October 19, about 11.30 A.M., while the trial was proceeding, a juryman was taken ill. Two medical men went to his assistance. The juryman left the jury-box, leaving the others remaining in the box. He was taken out of Court, but not out of the building, accompanied by the two medical men and James Phillips, one of the jury bailiffs mentioned above, to a space at the bottom of the building at the back of the Court, where there was open air and to which the public had no access. After a consultation between the medical men, one of them (Dr. Dyer, medical officer of Brixton Prison) returned into Court about 12.20 P.M. and gave an opinion as to when the juryman would probably recover. The Court then decided to adjourn for a short time, and Dr. Dyer was sworn to take charge of the juryman, the form of oath above set out being administered to him. He then returned to the juryman, and the two medical men, a constable, and Phillips remained with him in the open air for three-quarters of an hour. The juryman rejoined his fellows (who had during the short adjournment been in the charge of a Court bailiff sworn for the particular purpose in the same form of oath as that above set out) about 1 o'clock, Phillips having been with him the whole time he was absent from the rest of the jury, but not having been sworn for the particular purpose of taking charge of him. During the whole time the juryman was absent no one spoke to him about the trial. The medical men only spoke to him, and no one else had an opportunity of doing so. On the way to the open air less than a dozen persons had to be passed, and the juryman was in a state of collapse and was in such a condition as to be quite unable to communicate with any one.

At the trial the prisoner was called as a witness on his own behalf. At the close of the prisoner's evidence the prosecution applied for leave to call the witness Chilvers to give evidence in order to rebut a portion of the evidence given by the prisoner. It was objected on behalf of the prisoner at the trial that the

1910

REX v. CRIPPEN.

evidence ought not to be admitted at that stage. Lord Alverstone C.J. gave leave to call the evidence. Chilvers was accordingly called by the prosecution and gave evidence in rebuttal. It was not disputed before the Court of Criminal Appeal that the evidence given by Chilvers was admissible in law, the only objection on behalf of the prisoner being that it ought not to have been admitted by way of rebuttal, but ought to have been given by the prosecution in chief. It was admitted by the prosecution that the evidence of Chilvers could have been given in chief, but if it had then been given it would, in the opinion of counsel for the prosecution, have added nothing to the case for the prosecution as it then stood. It was not until the prisoner gave his evidence that the materiality of Chilvers' evidence became apparent to the prosecution and the application to admit it was made to Lord Alverstone C.J.

Tobin, K.C., *Huntly Jenkins*, and *H. D. Roome*, for the prisoner. No suggestion is made by the defence against the medical men, but an important question of principle is involved, as no bailiff was sworn to take care of the juryman while he was sick and while he was being attended. If a juror were allowed to be absent without being in the custody of a bailiff sworn to take charge of him, the practice might be carried to dangerous lengths. He ought to have been given in charge of the bailiff while the other eleven remained under the eye of the judge. Although the objection was not taken at the trial, it can be taken now. The jury ought to have been resworn, or a fresh juryman added, and the trial recommenced. By common law a jury was not allowed to separate in any case of felony. By the Juries Detention Act, 1897 (60 & 61 Vict. c. 18), juries were allowed to separate in cases of felony, except in murder, treason, and treason felony. There is a question as to whether the Court has power to quash the conviction on this ground. Its powers are limited by s. 4, sub-s. 1, of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), but under that section it can quash the conviction "on the ground of a wrong decision of" a "question of law" in that Lord Alverstone C.J. allowed the trial to proceed after this occurrence. Otherwise there is no remedy. The Court of King's Bench cannot

award a venire de novo unless an irregularity appears on the face of the record. As the verdict has been given in the present case and sentence has been passed and there is no irregularity on the face of the record, there is no jurisdiction to award a venire de novo: *Reg.* v. *Murphy.* (1)

1910

REX v. CRIPPEN.

As to the second ground of appeal, rebutting evidence which could have been given in chief as part of the case for the prosecution cannot be given for the purpose of strengthening the case for the prosecution after the evidence on both sides has been closed. It ought only to be given for the purpose of rebutting a case set up by the prisoner, which the Crown could not have anticipated.

The law was very clearly laid down by Tindal C.J. in giving judgment in *Reg.* v. *Frost.* (2) He said: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown."

Evidence which goes to confirm and strengthen the original case for the prosecution cannot be given in reply. The only evidence which a Court ought to allow to be given at that stage is evidence which tends to destroy the case for the defence: *Rex* v. *Stimpson* (3); *Rex* v. *Hilditch.* (4) If this evidence, which it is admitted could have been given in the first instance, was wrongfully admitted at the time, the Court can quash the conviction. The admission at that stage of evidence which could have been given in chief might lead to a miscarriage of justice. It places counsel for the prisoner in a terrible position. In the

(1) (1869) L. R. 2 P. C. 535.
(2) (1839) 4 St. Tr. (N.S.) at col. 386.
(3) (1826) 2 C. & P. 415.
(4) (1832) 5 C. & P. 299.

1910

REX v. CRIPPEN.

present case there was no opportunity to make inquiries, nothing on which to found a cross-examination. Even if the evidence had no effect on the minds of the jury its admission was open to objection, as the effect would be to introduce a very lax practice with regard to admitting evidence in reply. There is no suggestion that the prosecution was taken by surprise. [*Reg.* v. *White* (1) was also referred to.]

R. D. Muir, Travers Humphreys, and *Ingleby Oddie*, for the prosecution. The principle applicable to the question whether a bailiff of the Court ought to have been specially sworn to take charge of the juryman is that unless it can be shewn that there has been in fact some tampering with the jury in consequence of their separation, or at least some ground for suspecting it, the separation does not produce a mistrial. In *Reg.* v. *O'Neill* (2), during a trial for larceny, one of the jurymen left the rest under the impression that the case was over, and left the precincts of the Court with the intention of returning home. He was searched for and brought back an hour and a half later. O'Neill was convicted, and a motion for arrest of judgment was refused. It must be shewn that the jury could not have reassembled untampered with in order to constitute a mistrial. The practice of the Central Criminal Court in this matter is always followed at assizes and quarter sessions, and the bailiff is never sworn if he accompanies a juryman during a necessary temporary absence. As to the admission of the evidence of Chilvers, *Wright* v. *Willcox* (3) establishes that whether evidence in rebuttal should be admitted is in the discretion of the judge presiding at the trial, but that the exercise of that discretion is subject to review by a Court of Appeal. The decision in *Rex* v. *Hilditch* (4) was wrong. In the present case there is nothing to shew that the discretion was wrongly exercised.

Tobin, K.C., in reply. If the prosecution is allowed to keep back evidence which could have been given in chief until the last moment, it will result in some laxity in the conduct criminal trials.

(1) (1847) 2 Cox, C. C. 192.
(2) (1843) 3 Craw. & Dix. 146.
(3) (1850) 9 C. B. 650.
(4) 5 C. & P. 299.

The judgment of the COURT (Darling, Channell, and Pickford JJ.) was delivered by

DARLING J. With regard to the juror who was ill having left the jury-box while he was receiving medical attention, the argument on behalf of the prisoner merely comes to this, that although the bailiff had been sworn on the first day of the trial to take care of all the jurors during the adjournment, the juryman having been taken ill on the second day, and it being necessary for him to leave the Court, a decision wrong in law has been arrived at, and there has been a miscarriage of justice, because the bailiff who conducted him from the Court was not sworn for the particular purpose and he was allowed to be examined by two medical men, both of whom were in the first instance unsworn and who asked him necessary questions.

As to the question of the separation of the jurors the point made was that there is a rule that they must not separate. In our opinion the rule does not mean and never has meant that the jurors must not physically part from one another, but must all be kept within the narrow compass of the jury-box. Where a trial extends over several days, each juryman must of necessity be sometimes separated from the others, and it is notorious that jurymen sleep in different rooms when they retire for the night at the hotel to which they are conducted. Although the practice is that a Court bailiff is placed at each end of the particular corridor of the hotel into which the bedrooms open, each juryman has his own private bedroom and is thus physically separated from the others during the night, but there is no separation in the sense in which the word is used in the rule with which I am dealing. In the present case it appears that the bailiff who took charge of the juryman when he became ill had been sworn at the commencement of the trial. The juryman was taken ill suddenly, and Lord Alverstone C.J. directed or permitted doctors to go and speak to him. He was then in a state of collapse. The medical men came to the conclusion that it was essential that he should leave the jury-box and that he should be taken to the open air. In our opinion the rule with regard to the non-separation of the jurors is subject to the qualification that upon an emergency where it becomes necessary a juror

1910

REX v. CRIPPEN.

may leave the rest of his fellows. A juryman might be taken ill so suddenly that if delay were to occur while a bailiff was being sworn the juror's life might be in danger. In our opinion it was not necessary that the bailiff who in the present case conducted the juryman who suddenly became ill to the open air should be sworn. No doubt it is advisable that a bailiff who takes charge of a juryman should be sworn if there be time to do it, because it impresses upon the bailiff himself that he must not allow any one to tamper with the juryman, and it also impresses on the juryman that his temporary absence from the rest of the jurors must not be used by him as an occasion for discussing the case separately from the rest of the jury. In our opinion nothing was done by Lord Alverstone C.J. which was not justified in law. The facts in *Reg.* v. *O'Neill* (1) were much stronger than those in the present case, and the decision went much further than it is necessary for us to go.

The next question is whether there has been any violation of the principle that there must be no opportunity of tampering with the jury. If there had been any opportunity of tampering with the juryman who was taken ill this Court might say that there had been a miscarriage of justice, and if we had come to that conclusion we should have quashed the conviction. But in the present case, so far from there being any evidence of any opportunity of tampering with the juror, there was absolute evidence that there was none. No one spoke to the juryman but the medical men, and the bailiff was in charge of him all the time and ultimately conducted him back to the rest of the jurors. There is no sort of suggestion that there was any tampering with him in fact. The appeal on this point must therefore be dismissed.

As to the second ground of appeal, it was contended on behalf of the prisoner that the Court ought to quash the conviction upon the ground that Lord Alverstone C.J. improperly allowed the prosecution to give evidence after the close of the case for the defence, i.e., rebutting evidence. There is no doubt that the rule is that the judge at the trial in considering whether he should allow rebutting evidence to be given should

(1) 3 Craw. & Dix. 146.

consider whether the rebutting evidence could have been given in chief and ought to have been adduced by the prosecution as part of their case before they closed it. We do not feel inclined to lay down the rule as strictly as Tindal C.J. did in *Reg.* v. *Frost.* (1) We do not propose to adopt the language of Tindal C.J. The rule laid down in those terms may, we think, place an unfair burden on counsel for the prosecution in some cases. We prefer to express the rule by saying that the rebutting evidence must in the first place be evidence which is admissible in law. Assuming it to be admissible evidence, it then becomes a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting evidence.

In arriving at a decision upon that question the judge ought, no doubt, to have regard to the rule which has been established by the authorities. But the matter is one which is within the discretion of the judge who presides at the trial, who is in a much better position than any Court before which an appeal comes to determine whether it is really fair to allow the rebutting evidence to be given or not and whether it does or does not expose the defence to a disadvantage to which it ought not to be exposed. It does not appear to have been laid down in any of the authorities that if the judge at the trial exercises his discretion in a manner different from that in which the Court of Appeal would have exercised it, that is of itself a sufficient ground for granting a new trial or quashing the conviction. The only passage which contains any suggestion of the kind occurs in *Wright* v. *Willcox* (2), where Wilde C.J. said: "The time at which evidence is to be received must be in the discretion of the judge, the exercise of that discretion being subject to the review of the Court." Neither of the other judges who took part in that decision—Maule, Cresswell, and Talfourd JJ.—used the words "the exercise of that discretion being subject to the review of the Court" nor anything to that effect, and nothing was intimated by Wilde C.J. as to the circumstances in which the Court would set aside a verdict if they did not agree with the way in which the judge had exercised his discretion at the trial.

(1) 4 St. Tr. (N.S.) at col. 386. (2) 9 C. B. 650.

1910

REX v. CRIPPEN.

Maule J. said: "The objection to the reception of the evidence was that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised frequently occur. When a party has closed his case he often asks and is allowed to supply a deficiency." There is no doubt the matter is one in the discretion of the judge at the trial, who is necessarily in a far better position to exercise it with much more ample means of knowledge as to whether the evidence can be fairly admitted or not than is the Court of Criminal Appeal.

The evidence which was admitted in rebuttal was admissible evidence, and Lord Alverstone C.J. saw no reason why, in justice to the defence, it should not be given. He exercised his discretion, and, even if we have the power to do so, we see no reason why we should interfere. But if in any case it should be shewn that the prosecution has done something unfair—has set something in the nature of a trap—which has resulted in an injustice to a prisoner, the Court reserves to itself full power to deal with the matter. It is only necessary to say that in such a case the Court would probably come to the conclusion that there had been a miscarriage of justice and would exercise the powers given to it by s. 4 of the Criminal Appeal Act, 1907. But there is no reason to suppose that anything of that kind has taken place in the present case. We see no reason to think that there has been a miscarriage of justice, and therefore we do not interfere with the conviction.

Appeal dismissed.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitors for prisoner: *Arthur Newton & Co.*

J. E. A.

THE KING *v.* BROS.
Ex parte HARDY.

1910
Oct. 28.

Justice of the Peace—Indictable Offence—Evidence—Witness dangerously ill—Duty of Magistrate to take Deposition—Indictable Offences Act, 1848 (11 & 12 *Vict.* c. 42), *s.* 17—*Criminal Law Amendment Act*, 1867 (30 & 31 *Vict.* c. 35), *s.* 6.

It is the duty of the justice of the peace before whom a person appears charged with any indictable offence to take in the presence of the accused the depositions of all those who know the facts and circumstances of the case, wherever such a course is practicable. This duty obliges the justice of the peace, where it is practicable, to go to the residence of a witness who is dangerously ill and there take his deposition.

Whether it is or is not practicable in any particular case to take the deposition of a witness at the residence of the witness is a question for the justice of the peace to decide in the exercise of his judicial discretion, and in deciding that question he may take into account the fact that the taking of a deposition will in the particular case interfere with the business of his Court.

Rule directed to James Reader White Bros, a metropolitan police magistrate, to shew cause why he should not take the evidence of one Ralph Price Hardy at the residence of the said R. P. Hardy pursuant to s. 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42) (1), or pursuant to s. 6 of the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35) (1), in order that such evidence might be used upon the hearing of a certain information preferred by the said R. P. Hardy against William Garland, Thomas McDonnell, Thomas William Whiteman, and Samuel Robert Whiting, charging against them certain offences under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), on the ground that the said magistrate had no power to refuse to take the evidence of the prosecutor either under s. 17 of the Indictable Offences Act, 1848, or under s. 6 of the Criminal Law Amendment Act, 1867, and that he should have taken such evidence, it having been satisfactorily proved that the prosecutor was a willing and material witness and was in such a dangerous condition of health as to be physically unable to attend the Court.

(1) See note at p. 164, post.

1910

REX v. BROS. HARDY, *Ex parte.*

The following facts appeared. The said Ralph Price Hardy applied for a summons under s. 24 of the Assurance Companies Act, 1909, against William Garland, Thomas McDonnell, Thomas William Whiteman, and Samuel Robert Whiting, charging them with certain offences under that section, which provides that if any account, balance-sheet, abstract, statement, or other document required by the Act is false in any particular to the knowledge of any person who signs it, that person shall be guilty of a misdemeanour and shall be liable on conviction on indictment to fine and imprisonment, or on summary conviction to a fine not exceeding 50*l.*

The summons came on for hearing on September 15, 1910, and was adjourned until October 5, 1910, On that occasion the defendants elected to be tried by a jury, and certain evidence was then taken in the form of a deposition.

In his affidavit in support of the rule the prosecutor stated that he himself was a material witness and was willing and desirous to give evidence. It was also proved that he was dangerously ill and that further attendance at the police court might cause his death.

On October 11 an application was made to the police magistrate that the evidence of the prosecutor might be taken at his residence under s. 6 of the Criminal Law Amendment Act, 1867, commonly known as Russell Gurney's Act. The prosecutor alleged that the police magistrate had refused to grant the application, and on these grounds he obtained the rule mentioned above.

In reply to the rule the learned magistrate made an affidavit in the following terms:—

"In this case an application was made under Russell Gurney's Act, s. 6, for me to take the deposition of Ralph Price Hardy, said to be dangerously ill. As the depositions are being taken before the Court under the Indictable Offences Act, 1848, I was of opinion that that was the proper procedure in this case. I refused therefore to take the deposition under Russell Gurney's Act on the authority of *Reg.* v. *Katz.* (1) No application has yet

(1) (1900) 64 J. P. 807.

1910

REX v. BROS. HARDY, *Ex parte.*

been made for me to take the deposition under s. 17 of the Indictable Offences Act, 1848.

"As the case is still pending I have no doubt application will be made and I shall be glad of the direction of the Divisional Court of the King's Bench Division in the matter.

"It is practicable and permissible to take the deposition under the Indictable Offences Act, 1848, but the question for the Court is whether it is expedient. It is unusual for the Court to take a deposition outside the court-house except in the case of murder and perhaps manslaughter, and I have never known it done in the case of a misdemeanour.

"Information was laid and a summons issued under s. 24 of the Assurance Companies Act, 1909, which makes it a misdemeanour to falsify a balance-sheet. The matter could have been dealt with summarily, but, doubts having arisen as to the jurisdiction of the Court, it was decided to take depositions under the Indictable Offences Act, 1848, in order that the defendants might be tried on indictment at the Central Criminal Court. If the case had been dealt with under the Summary Jurisdiction Acts it would have been heard, tried, and determined in open Court under s. 20 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

"Now applications to the magistrate to go out and take depositions are made only by a superior officer of the police in serious charges. It would be a new departure to allow private prosecutors to take the magistrate away from his Court whenever an important witness in an indictable misdemeanour was certified to be dangerously ill."

Leycester, having represented the defendants in the police court, appeared as amicus curiæ.

Leslie Scott, K.C., and *Poley*, in support of the rule.

DARLING J. In this case a rule has been obtained calling upon a metropolitan magistrate to shew cause why he should not take the evidence of one Ralph Price Hardy at the residence of the said R. P. Hardy, a person who was dangerously ill and not likely to recover. By s. 17 of the Indictable Offences Act,

1910

REX v. BROS. HARDY, *Ex parte.*

Darling J.

1848, where a person appears before a magistrate charged with any indictable offence there is an obligation imposed on the magistrate to take in the presence of the accused the statement of those who shall know the facts and circumstances of the case. That enactment would oblige the magistrate to go to the bedside of a witness who is so ill as to be unable to travel and to take his deposition in all cases of indictable offences. In that state of the law the Criminal Law Amendment Act, 1867, was passed, s. 6 of which provides that whenever it is made to appear to any justice of the peace that any person dangerously ill and not likely to recover from his illness is able to give material information relating to any indictable offence, and it shall not be practicable for a magistrate to take the deposition of that person in accordance with the provisions of the earlier Act, it shall be lawful for the justice of the peace to take the statement of that person.

Now in the present case the magistrate asks us to give him some advice as to how he should act. As to some matters we are disposed to accede to his request, but as to others he is himself the person to decide them and we have not the means to help him. Primarily it is his duty to take the depositions of all persons who know the facts and circumstances of the case; but it may not always be practicable to do so. It is obvious that to come before a magistrate engaged in hearing cases in his Court and ask him on the spur of the moment to break off the work he has in hand and go away to a distance and take a deposition is to ask him to do what may not be practicable. He cannot attend to the business of his Court and at the same time be away taking the deposition of a witness. He must neglect his duty in the one case if he performs it in the other. Now it is not necessary for him to perform the latter duty, since application can be made to some other justice of the peace, one who may possibly be found nearer to the residence of the witness whose deposition is required.

But we are told that it is unusual for the magistrate to take a deposition outside his court-house, except in the case of a murder or perhaps manslaughter, and that the magistrate in the present case has never known it done in the case of a misdemeanour. I can only say that the Act puts no such

limits to the power or duty of the magistrate to take the deposition. That power or duty is exercisable in the case of any indictable offence, and when one considers the infinitely varying degrees in the gravity of the crime of manslaughter it seems absurd to select that crime for any preferential treatment in this respect. It is further said that applications to a magistrate to go out and take depositions are made only by a superior officer of police in serious charges, and that it would be a new departure to allow private prosecutors to take a magistrate away from his Court whenever an important witness in an indictable misdemeanour case is certified to be dangerously ill. If that implies that the magistrate should be called upon to leave his Court, whether it were practicable or not for him to do so, it might well be a new departure, because he is not bound to leave his Court to take a deposition if it is impracticable; he may say that within the meaning of s. 6 of the Criminal Law Amendment Act, 1867, it is not practicable or permissible for him to leave his Court. But as to the practice suggested in the affidavit of the magistrate in the present case there is no authority whatever for such a practice. A magistrate has no right to lay down a rule that he will not go and take a deposition unless on the application of a superior officer of police, or except in cases of murder or manslaughter, or except in cases which he may regard as serious, or to make any exception in the case of misdemeanours. In all cases of indictable offences, if it is practicable for him to go, he must go. The question whether it is practicable or not is for the magistrate to decide in the exercise of his judicial discretion.

PICKFORD J. I am of the same opinion. Sect. 17 of the Indictable Offences Act, 1848, imposes upon the magistrate before whom a person appears charged with an indictable offence the duty to take depositions; and it imposes that duty not only in cases of murder or manslaughter, or in cases of felony as distinguished from misdemeanour, but in all cases of indictable offences. If it is not practicable for him to do so in a given case, then, by s. 6 of the Criminal Law Amendment Act, 1867, application may be made to another magistrate; but if it is

1910

REX
v.
BROS.
HARDY,
Ex parte.

Pickford J.

practicable, then it is not for the magistrate to consider whether it is expedient. The result of any other decision than this might be disastrous, because a magistrate might say that it was practicable and permissible for him to take the deposition in question—in which case it could not be taken under the Criminal Law Amendment Act, 1867—but that it was not expedient—in which case, if his view were correct, he would not be bound to proceed under the Indictable Offences Act, 1848, and so the deposition would not be taken at all.

I agree that in considering whether it is practicable for him to take a deposition of a person who is dangerously ill and not likely to recover the magistrate may take into account the fact that in a particular case the taking of the deposition would interfere with the public business in his Court.

LORD COLERIDGE J. I agree. The magistrate in this case having held that it is practicable and permissible for him to take the deposition under s. 17 of the Indictable Offences Act, 1848, in effect submits to us the validity of a practice affecting to confine his duty to take depositions to cases of murder and manslaughter, and then only when application is made by a superior officer of police, and absolving him from that duty altogether in cases of misdemeanour. The law does not justify that practice. If it is practicable, he must go and take the deposition when asked to do so. He is the person to decide whether it is or is not practicable.

The magistrate not having refused to take the deposition,

Rule discharged.

Solicitors for prosecutor: *Blanckensee & Co.*
Solicitors for defendants: *Hargrave, Son & Barrett.*

NOTE.—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17:—"In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, ... such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, ... take the statement on oath or affirmation of those who shall know the facts and circumstances of the case,

and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; . . . . and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), commonly called Russell Gurney's Act:—

Sect. 6: "Whereas by section 17 of the Act 11 & 12 Vict. c. 42, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead, or so ill as to be unable to travel: And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: Therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and . . . . transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to

1910

REX v. BROS. HARDY, *Ex parte.*

travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the Court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same."

W. H. G.

1910

Nov. 8.

DOUGLAS *v.* SANDERSON.

POTTS *v.* SANDERSON.

Parliament—Franchise—County Franchise—Borough Franchise—Freehold—Flat—"House or other building occupied by himself"—Representation of the People Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 24.

By s. 24 of the Representation of the People Act, 1832, it is enacted that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, such house, warehouse, &c., being of such value as would confer on him the right of voting for any city or borough.

The appellant had an estate or interest as a freeholder in a two-storey building, each storey of which formed a separate dwelling-house entered by a separate outer door. He occupied the upper storey himself. The lower storey was let or to let to a tenant:—

Held, that the lower storey was not occupied by the appellant himself within the meaning of the above enactment, and that the appellant was entitled to vote in the election of a member for the county in respect of his freehold estate or interest therein.

CASES stated by the revising barrister for the Tyneside Division of the county of Northumberland.

In the case of *Douglas* v. *Sanderson* the appellant claimed to have his name inserted in the list of ownership voters for the parish of Jesmond, Newcastle-on-Tyne. His claim was in the following form:—

Name of Claimant.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Douglas, George.	59, Wolseley Gardens.	Freehold House.	57, Wolseley Gardens.

The claim was duly objected to.

The appellant was freeholder of a two-storey building known as 57 and 59, Wolseley Gardens. Each storey formed a separate dwelling-house entered by a separate outer door. The appellant occupied the upper storey, known as No. 59. The ground floor, known as No. 57, was occupied by one William Wray as his tenant. The appellant and William Wray occupied separate yards in the rear of the building. They were each entitled to be and were in fact registered as voters in respect of their occupation on the list of occupation voters, Division I., for the city of Newcastle-on-Tyne.

It was contended for the objector that s. 24 of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45) (1), precluded the appellant from being registered as an ownership elector for the Tyneside Division because he was himself in occupation of the upper storey of the building and qualified to vote for the city in respect of that occupation.

It was contended for the appellant that he was entitled to be registered in respect of his ownership of No. 57, the separate dwelling occupied by Wray. The revising barrister thought the claim was barred by s. 24 of the Representation of the People Act, 1832, and rejected the claim.

Notice of appeal against this decision was duly given.

In the case of *Potts* v. *Sanderson* the appellant claimed to have his name inserted in the list of ownership voters for the same parish. His claim, which was duly objected to, was as follows :—

Name of Claimant.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Potts, Adam.	33, Buston Terrace.	Freehold House.	35, Buston Terrace.

(1) Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 24: "No person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or

1910

DOUGLAS v. SANDERSON. POTTS v. SANDERSON.

The facts were similar to those stated in *Douglas* v. *Sanderson* except that the lower floor, No. 35, was unoccupied. The appellant occupied the upper floor known as No. 33.

The revising barrister rejected this claim upon the grounds stated in *Douglas* v. *Sanderson*. Notice of appeal was duly given, and it was ordered that the two appeals should be consolidated. In each case the clerk to the county council was named as respondent.

Lewis Coward, K.C., and *Daldy*, for the appellants. The object of s. 24 of the Representation of the People Act, 1832, was to prevent land lying within a parliamentary borough from conferring a double franchise for the borough and the county: *Burton* v. *Overseers of Aston*. (1) If a man owns and occupies the same tenement within a parliamentary borough he cannot vote for the county in respect of his ownership as well as for the borough in respect of his occupation.

The arguments which apply to *Douglas's Case* apply equally to *Potts's Case*. Dealing then with the former case, the real question is whether the appellant, owning as he does the whole, and occupying a part, of the building in question, must be taken to occupy the whole in addition to owning it, or whether the portion which he does not occupy is a separate tenement from the portion which he does occupy. There may be separate freeholds in separate floors or storeys of one building: *Anstey's Case* (2); and the true view in this case is, as the revising barrister has found, that Nos. 57 and 59, Wolseley Gardens are separate houses: *Allchurch* v. *Assessment Committee and Guardians of Hendon Union*. (3) The appellant owns and occupies No. 59; he owns but does not occupy No. 57. There is therefore nothing to disqualify him in respect of the last-mentioned tenement. If the view of the revising barrister is

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jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof."

(1) (1849) 8 C. B. 7.

(2) (1804) 2 Peck. 109.

(3) [1891] 2 Q. B. 436.

right, the owner of a block of flats within a parliamentary borough would be disqualified from voting in respect of his ownership if he occupied one flat himself.

Bethune, for the respondent. The appellant has an estate or interest as a freeholder in the building consisting of Nos. 57 and 59, Wolseley Gardens. He owns the entire building. There is no severance so far as his ownership is concerned. Then is that building occupied by himself? Clearly it is. He actually lives in the upper portion of it and uses the lower portion as a support for the upper. Different considerations apply in cases where houses are laterally and where they are vertically contiguous: *Webb* v. *Aston* (1); *Proctor* v. *Annison*. (2) In the latter case the occupation of the upper tenement must necessarily involve the occupation of the lower. The freehold estate or interest in the land is what qualifies the ownership elector; the two tenements occupy the same land; if the elector occupies one tenement he ipso facto occupies the land. What applies to the appellant Douglas applies, mutatis mutandis, to the appellant Potts.

Daldy in reply. The occupation which under s. 24 of the Act of 1832 disqualifies a freeholder from voting for the county is an occupation which is capable of qualifying him to vote for the borough; that is to say, it must be an occupation "as owner or tenant": see s. 27 of the Act. Douglas in the one case and Potts in the other were not occupiers as owners or tenants of the lower tenements. They were and are the owners of those tenements, and are therefore qualified to vote for the county in respect of their ownership.

LORD ALVERSTONE C.J. In this case I think that the revising barrister has come to a wrong decision. The facts are not in dispute. In each case the appellant owned the whole building, which, however, was divided into two separate and distinct dwelling-houses. In *Douglas's Case* the lower house, No. 57, was occupied by Wray, and the upper house, No. 59, by the appellant himself. In *Potts's Case* the appellant himself occupied the upper house, No. 33, and the lower house, No. 35, was

(1) (1843) 5 Man. & G. 14. (2) (1859) 7 C. B. (N.S.) 48.

1910

DOUGLAS v. SANDERSON. POTTS v. SANDERSON.

Lord Alverstone C.J.

unoccupied. The revising barrister thought that because the owner in each case occupies the upper floor of the building he is within the disqualification of s. 24 of the Representation of the People Act, 1832. The main purpose of that enactment was to prevent a man from exercising the county franchise in respect of premises occupied by him in a parliamentary borough and qualifying him to vote as a burgess. It was not intended to disqualify him absolutely from voting for the county; if his occupation is not of such value as to qualify him to vote as a burgess he may vote in respect of his ownership for the county. The question arises upon the meaning of the words "house, warehouse, counting-house, shop, or other building occupied by himself." Whatever view might have prevailed in the year 1832, it cannot in these days be said that, for the purposes of the franchise, a man who occupies an upper storey resting upon a lower is, merely by reason of that support, the occupier of the lower storey also. That would be too strict a construction of the word "occupied." Mere user as a support is not occupation in the sense in which persons occupy a house, warehouse, counting-house, shop, or other building. When, in *Douglas's Case*, we find that Wray is in exclusive occupation of all that can be occupied in No. 57, and that the only vestige of occupation that remains in Douglas is the support afforded by its walls, we must hold that the statute did not contemplate occupation in that technical sense. For the purpose of the Acts dealing with the franchise, occupation means actual substantial occupation, such occupation as has in this very case served to place Wray and not Douglas upon the occupiers' list in respect of No. 57. The revising barrister has found that each storey of this structure forms a separate dwelling-house; and in my opinion each of the appellants, Douglas and Potts, was the freeholder of a house or building not "occupied by himself" within the meaning of s. 24 of the Act of 1832. The technical point taken on behalf of the respondent fails, and this appeal must be allowed.

DARLING J. I do not think that the appellant in either case is the occupier of the whole structure. He is in each case the occupier of part of the structure. He is only disqualified in

respect of his "estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself." Building, in this enactment, follows house, warehouse, counting-house, &c. That shews what sort of building is intended. In each case the structure in question is, properly speaking, two houses or buildings, one of which the appellant does occupy and the other of which he does not occupy. In each case he is the freeholder of both houses or buildings and the occupier of one of them. In my view therefore the contention of the respondent fails.

PICKFORD J. I am of the same opinion.

Appeal allowed.

Solicitors for appellants: *Bull & Bull.*

Solicitor for respondent: *Philip Thornton, for C. D. Forster & Co., Newcastle-on-Tyne.*

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1910 *Feb.* 9, 10, 11, 14, 23.

C. A. *June* 9, 10, 13, 14, 15, 16; *July* 28.

DENABY AND CADEBY MAIN COLLIERIES, LIMITED *v.* ANSON.

Harbour—Rights of Navigation—Right of Shipowner to moor Coal Hulk in Navigable Harbour to supply Steamships with Coal—Trespass—Dockyard Ports Regulation Act, 1865 (28 & 29 *Vict. c.* 125).

The right of the public to the use of the waters of a navigable harbour is limited to user for the purposes of navigation and fishery and matters incidental thereto, and any right of navigation claimed over such waters must be a right incidental to the navigation of the person claiming it, and not a right incidental to the navigation of others.

A claim by colliery owners of a right as members of the public to moor in a public harbour a coal hulk for the purpose of supplying coals therefrom to merchant vessels entering the harbour is a claim of a right not incidental to navigation and is bad in law.

Rex v. *Russell*, (1827) 6 B. & C. 566, discussed and disapproved.

APPEAL of the plaintiffs from a decision of A. T. Lawrence J. The facts will be found set out in detail in the judgments and may be summarized as follows.

C. A.
1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

The plaintiffs, who are the owners of the steamship *Persia*, brought this action for an injunction restraining the defendant, his servants or agents, from "seizing, taking possession of or trespassing upon the plaintiffs' British registered steamship *Persia* now lying at her own anchors at the port of Portland in the county of Dorset within the area of the port appropriated to merchant shipping and from removing the said vessel from the said port." In November, 1909, the plaintiffs sent out a circular to their customers in which they informed them that they proposed to establish their steamship *Persia* at Portland as a hulk or floating depot for the purpose of bunkering ships with coal; the circular went on to say that the *Persia* would be equipped with the most improved appliances for affording quick despatch to vessels seeking coal by day or night. The defendant, who was the King's harbour-master at Portland, gave notice to the plaintiffs that he could not grant permission to add to the number of coal hulks already moored in Portland, but the *Persia* nevertheless entered the harbour and moored in that part of it which is known as the merchant shipping anchorage. The *Persia* having refused to leave the harbour when ordered so to do by the defendant, the latter threatened to have her forcibly removed, whereupon the present action was brought by the plaintiffs.

Portland Harbour is a "dockyard port" within the meaning of the Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125). By s. 4 of that Act, "The Admiralty may from time to time appoint for each dockyard port a fit person to superintend the execution of this Act, and otherwise to protect the port, to be called the [Queen's] harbour-master for the respective port." Under this section the defendant was appointed King's harbour-master at Portland. Sect. 5 provides that, "In relation to any dockyard port it shall be lawful for Her Majesty in Council, from time to time, by Order in Council, to make regulations for all or any of the following purposes; namely, To prohibit the mooring or anchoring of vessels so as to obstruct navigation into, in, or out of the port: To appropriate any space as a mooring place or anchoring ground for the exclusive use of Her Majesty's vessels, but not so as to authorize any user of such space in such

manner as to obstruct navigation into, in, or out of the port: . . . . And for such other purposes as from time to time seem necessary with a view to the proper protection of Her Majesty's vessels, dockyards or property, or to the requirements of Her Majesty's naval service." By an Order in Council dated February 16, 1903, the limits of the dockyard port of Portland were defined, and by the First Schedule regulations for the protection of the port, and for anchoring, berthing, mooring, and breaming in that port were laid down. By clause 3 of that schedule, "moorings for private vessels may be laid with the permission in writing of the King's harbour-master, and in such positions as he shall deem fit, but such moorings shall not be laid without such permission, and shall be forthwith removed on the requisition of the King's harbour-master to that effect." By clause 13, "all merchant or other private vessels shall be subject to the direction of the King's harbour-master." By clause 14, a defined portion of the anchorage is reserved for the exclusive use of His Majesty's ships, "and no merchant or other private vessel shall anchor therein except with the permission of the King's harbour-master." By clause 15, another defined portion is reserved for a torpedo range, "and no vessels shall anchor therein, except with the permission of the King's harbour-master." By clause 16 "merchant or other private vessels may, subject to the directions of the King's harbour-master, anchor" in another defined portion. Clause 17 provides for a penalty not exceeding 10*l.* for contravention by the masters of merchant or other private vessels or by any other person of the provisions and regulations of the Order.

At the trial before A. T. Lawrence J. evidence was called, which it is unnecessary here to detail, and at the conclusion of the arguments judgment was reserved.

Leslie Scott, *K.C.*, *Greer*, and *Courthope Wilson*, for the plaintiffs.

Sir W. S. Robson, *A.-G.*, and *B. A. Cohen*, for the defendant.

It is considered unnecessary to give a separate report of the arguments, which were substantially the same as those in the Court of Appeal.

1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Feb. 23, 1910. A. T. LAWRENCE J. read the following judgment:—The plaintiffs are a colliery company in Yorkshire, and are the owners of the hulk *Persia*, late a steamship of the Anchor Line. They bring this action for an injunction to restrain the defendant, who is the King's harbour-master of the dockyard port of Portland, from removing the *Persia* from such port. The plaintiffs in November last issued circulars to their customers informing them that they proposed to station the *Persia* at Portland as "a hulk" or "floating depot" for the purpose of bunkering ships with coal. They stated that the *Persia* would be equipped with the most approved appliances for affording quick despatch to vessels seeking coal by day or night. Immediately on this circular coming to the attention of the defendant he informed the plaintiffs that permission could not be granted to add to the number of coal hulks already moored in Portland Harbour. The plaintiffs disregarded this notice; the *Persia* entered the harbour and took up a position in the part of it which is appropriated as a merchant shipping anchorage. The defendant, after pointing out that she was there in violation of the notice he had given and of the directions of the Lords of the Admiralty, ordered her to leave the harbour; this she refused to do. The defendant then threatened to have her removed, whereupon this action was brought and an injunction claimed.

The plaintiffs take up the position that they are entitled to keep the hulk permanently in the harbour, and for this purpose to attach it to the soil of the harbour by appropriate means. They are willing to concede to the harbour-master the right from time to time to move the hulk in the harbour as occasion may require. The crew and navigating staff have been discharged, and the *Persia* is now manned by bunkering men only; she is moored by her own anchors, which can be weighed. She swings at the centre of these moorings; in all other respects she is stationary.

Portland is a dockyard port within the provisions of the Act 28 & 29 Vict. c. 125. The limits of the port have been defined by an Order in Council of February 16, 1903. Within these limits is the harbour, enclosed on the west and the north and south-west by the land, and on the east and north and south-

east by four breakwaters, having three entrance channels. The enclosed space is divided into three sections—(1.) men-of-war's anchorage; (2.) torpedo range; and (3.) merchant ships' anchorage. It is not a commercial port except for Portland stone. It is a port of refuge from storm, and is a convenient coaling station, chiefly for ships going north and east. A considerable portion of the original merchant shipping anchorage has been appropriated to the needs of the Navy, by extending the torpedo range and by anchoring destroyers and lighters within its limits.

The defendant, who gave his evidence with absolute candour and impartiality, stated that in his judgment the whole area within the breakwater was needed for the requirements of His Majesty's naval forces, but that his orders were to afford all facilities to merchant ships seeking refuge in the harbour or desiring to coal there, and that these objects he has done his utmost to serve. I have no doubt that these statements are accurate. There were, before the arrival of the *Persia*, ten coaling hulks for the use of merchant ships permanently moored within the anchorage, by the permission of the authorities. There was no evidence before me that these were not sufficient to meet the requirements of the port, and the defendant had received no complaints of their inefficiency. I come clearly to the conclusion as a fact that both the defendant and the Lords Commissioners of the Admiralty formed the opinion (1.) that the existing coaling hulks were sufficient, and (2.) that the addition of the *Persia* would tend unduly to impede navigation in this harbour and the purposes for which it exists. I do not think that I am entitled to review these decisions, but if I were, I should not upon the evidence before me differ from them. I have no doubt, however, that Mr. Earnsby, the manager of the *Persia*, to whose energy the advent of this further hulk appears to be due, is right in thinking that with her more up-to-date appliances he would soon succeed in capturing the coaling trade of the port and would very substantially increase it.

It is argued that the plaintiffs had a legal right to have the hulk kept in the harbour as an exercise of the right of navigation. This is, I think, wrong in fact. A stationary coaling depot does not exercise rights of navigation merely because it

1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

A. T. Lawrence J.

floats. Navigation is on water what locomotion is on land. The right of navigation is a right of passage, with rights of stopping, anchoring, &c., for purposes incidental to passage to and fro. This ship, the object and purpose of which are best served the more permanent its location is, cannot be said to be engaged in navigation. Then it is said that, if the ship is not exercising rights of navigation itself, it is incident or auxiliary to the rights of navigation of others, namely, that portion of the public interested in steamships. That coal is used in navigation is not denied, but how this fact should have the effect of giving the plaintiffs rights in Portland Harbour was never made clear to me. The plaintiffs seem to claim to be clothed with the rights of that portion of the community which is interested in steam shipping, and thus to have the right to affix this hulk to the soil just as the ships of such persons may drop anchor. To represent this section of the public it would be necessary that the action should have been brought in the name of the Attorney-General in his representative character. The company possesses no such right itself.

Mr. Leslie Scott invoked the advance of trade and commerce in general as a reason for granting this injunction, and suggested that there was some lack of clarity of thought in the argument presented for the defendant. The claim of the plaintiff company seems to me to be more open to this charge; for the company as one of the public is not exercising any right known to the law. The space it occupies by this ship it occupies adversely to the defendant, to the Admiralty, to the King, and to all the world. Except for the public right of navigation and the Crown rights in the soil, which I will consider in a moment, I see no reason, if the plaintiffs' contention be correct, why they should not in twelve years acquire the fee simple in the soil of the area they occupy under the Real Property Limitation Act. The *Persia* is necessarily an obstruction to navigation over this site, seeing that no two bodies can be in the same place at the same time, and, unless the plaintiff company can justify this fact by shewing that it is there in the exercise of a right recognized by law, it fails in limine to make good its claim to an injunction. No question of reasonable user of the harbour arises unless the

plaintiffs are exercising such a right. They do not clothe themselves with a right by using vague language about commerce and the conveniences of modern trade, nor by shewing that their coal depot would be a much better commercial undertaking than that of the existing coal hulks. Whether the Admiralty have exercised their powers wisely by permitting these old hulks to continue in the enjoyment of the privilege extended to them is not a matter for my consideration. I have not heard either what their owners or the Admiralty have to say upon the subject. Similarly the arguments founded upon the curtailment of the merchant shipping anchorage which has taken place without the formal authority of an Order in Council are irrelevant; the plaintiffs must first shew that they are exercising a right known to the law before they can ask to have their claim to use this spot compared with the user conceded to others. It is not sufficient to say that the trade of bunkering ships is a lawful trade. It is, but it cannot be carried on wherever the plaintiff company pleases. For the defendant it was contended that the soil of the harbour is the property of the Crown, and that, as the plaintiff company was not exercising rights of navigation, but was in fact placing anchors in the soil, intending to retain permanent possession thereof, it was a trespasser and could be removed. The plaintiffs denied each of these propositions; at first they stoutly denied that the property in the soil was in the Crown. There can, I think, be no doubt that it is vested in the Crown, or in one of the departments in which Crown lands are now vested. It is not necessary to consider the views of Selden and of Hale as to Crown property in the narrow seas, nor the decision of the Court of Queen's Bench in *Reg.* v. *Keyn* (1) as to the limitation to be put upon these authorities and upon the more modern three-mile limit, for whatever may be the true view as to the soil in the open sea below low water mark, it has never been held, so far as I know, that the property in the soil of harbours and navigable rivers within the realm is not prima facie vested in the Crown. It may, of course, be found upon investigation to be vested by grant or by prescription in some one else. In the case of Portland this ownership is conspicuous in a peculiar and special

(1) (1876) 2 Ex. D. 63.

1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

A. T. Lawrence J.

degree, for not only does the harbour lie inter fauces terræ, but it is appropriated and enclosed by breakwaters; and, as appears by the Acts of Parliament that deal with it, the King is lord of the manor of Portland, and there existed as long ago as 1847 a pier known as the "King's Pier," even then in ruins. Further, the additional lands taken by the Act of 1847 (1) for the purposes of the harbour were vested in the Queen, her heirs and successors; and subsequent statutes have recognized the fact that the harbour is Crown property. The Act of 1857 (2), ss. 12 and 18, may be referred to as clear expressions of this fact. I have, therefore, no doubt that the title to the soil in question is vested in the Crown, subject only to the public rights of and incidental to navigation over it.

Mr. Leslie Scott argued that, even assuming the title were in the Crown, it was a title shorn of all attributes of property other than those expressly conferred or recognized by the Act of 1865, or the Orders in Council made thereunder. That the Crown holds this bed of the sea for the public is true, but that that deprives it of any ordinary rights of property against a wrong-doer is a view of the law which I cannot accept. This is to confuse the incidents of the property with the objects for which it is held. The Act of 1865 by s. 5 enumerates the purposes for which regulations may be made by Order in Council. It defines the purposes for which special laws may be made affecting the exercise of any rights within the area in question, namely, this dockyard port. It has no need for provisions dealing with an act of trespass. The regulation No. 3 contained in the Order in Council, which deals with moorings for private vessels, does not relate to coal depots or other permanent structures, but to moorings for ships navigating the harbour, just as regulation 2 does in the case of His Majesty's ships. The contrast so much relied upon between the language to be found in clauses 14 and 15 and that in clause 16 seems to be natural in view of the fact that clauses 14 and 15 deal with circumstances that would rarely occur, whereas those in clause 16 would be of daily, nay, almost hourly, occurrence. If it were necessary to find statutory authority for the act of the defendant it may be found

(1) 10 & 11 Vict. c. 24. (2) 20 & 21 Vict. c. 32.

in s. 4 of the Act. He is applying the ordinary means used in civil life to "protect the port" from trespass. In my opinion, the property in the soil being in the Crown, and the possession and administration of that property being in the Lords Commissioners of the Admiralty by their servant, the defendant, I hold that he had the right to refuse permission to the plaintiffs' ship to take up a trading station and form a coal depot in the dockyard port of Portland.

A great many cases were cited to me during the elaborate argument of Mr. Leslie Scott. I do not think any purpose would be served by my reviewing them in detail. The fundamental difference between this case and those is that in each of them there was a right being exercised, either of riparian property or of navigation, or of passage over a highway; it was the extent, whether due or otherwise, of the exercise of such right which was in question. There is no place for the consideration of reasonableness or discretion where the claim of a plaintiff is to a right in alieno solo which is not recognized by law. The plaintiffs, if they wish to set up a shop on land or a coal depot in a harbour, must arrange with the owner of the soil of the land which they propose to occupy. This Court will not grant an injunction restraining the owner or his servant from removing him so long as he remains a trespasser; this the plaintiff company became when the *Persia* ceased to be a ship engaged in navigation. There must be judgment for the defendant with costs.

The plaintiffs appealed.

June 9. *Leslie Scott*, *K.C.*, and *Greer* (*Courthope Wilson* with them), for the plaintiffs. The first question is as to the rights of the public at common law with regard to the user of the public ports and harbours of the realm for the purposes of navigation and matters ancillary thereto. A further question arises as to the effect in this case of the Dockyard Ports Regulation Act, 1865, and the Order in Council made thereunder, and whether under them the defendant, as harbour-master, had the right to remove the *Persia* from Portland Harbour.

In a sense, no doubt, the harbour is vested in the Crown, but

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

it is clear that at common law that right of the Crown is not the same as that of an owner of private land, but is subject to the enjoyment therein by the public of rights of navigation and fishery. The *Persia* was not engaged in navigation in the sense of seagoing locomotion, but the rights included in the term "navigation" for this purpose are not confined to such locomotion. There are obviously matters ancillary to navigation which would be included in the rights of the public with regard to navigation, although they would not themselves be navigation in the sense of locomotion; for example, the right to anchor or take up moorings in a harbour for temporary shelter from stress of weather, or for the purpose of taking in or discharging cargo or for the purpose of repairs, or obtaining supplies, either of stores or coal. In the present appeal the important question is as to the extent of the rights of the public with regard to matters ancillary to navigation. It is not disputed that it is practically necessary that steamers should be able to obtain supplies of coal from hulks at Portland. That being so, it is submitted that it is part of the public right in respect of such a harbour as Portland that there should be efficient and up-to-date facilities there for the supply of coal to steamers requiring it; and that, as there is a right in the owners of ships to enter the harbour and remain there for the purpose of obtaining such a supply, so it is the right of members of the public to use the harbour for providing that supply by stationing there efficient and up-to-date facilities for the purpose of affording it, provided that there is room in the harbour and no obstruction or nuisance is thereby created. It must, perhaps, be taken against the plaintiffs that the learned judge has found that under the arrangements at present in force in the harbour the *Persia* would be an obstruction; but it was not denied by the defendant that the other coal hulks already there were inefficient and not up to date, and that an unnecessary amount of space was occupied by them because of their small capacity; and it is contended that it is clear on the evidence that, by making a reasonable rearrangement, there would be ample space in the harbour for the *Persia* without her being an obstruction. It is not contended that she is entitled to remain always stationed at any particular spot in

the harbour; she would, no doubt, be liable to be moved from one spot to another as the harbour-master might consider necessary from time to time, having regard to the exigency of changing circumstances; and if in fact there were at any time for any valid reason no room in the harbour for her, the harbour-master could turn her out for a time till there was room. Subject to this, it is admitted that the intention of the plaintiffs is, and they claim, that she should permanently remain there. Suppose that the plaintiffs had claimed to bring her into Portland Harbour as a coal-carrying ship and to keep her there till her cargo of coal was taken off by vessels requiring coal, and then to go back to the east coast for another cargo of coal and re-enter the harbour with it, and so on, such operations would clearly be covered by the term "navigation." Practically, such operations would have the same result as that which the plaintiffs claim to do, because it is admitted that, if at any time there is really no room for the *Persia* in the harbour, she might be turned out. The public policy underlying the common law doctrine as to the right of the public in respect of navigation in such waters as Portland Harbour cannot depend on such a narrow distinction as that between such operations and that which the plaintiffs claim to do. If there is no case which precisely affirms the existence of such a right as the plaintiffs claim, the common law is elastic enough to admit of a sufficiently wide extension of the meaning of the term "navigation" in this connection.

Secondly, it is put against the plaintiffs that, whatever may be the case at common law, the defendant, as harbour-master, had power to remove the *Persia* from the harbour under the Dockyard Ports Regulation Act, 1865. The plaintiffs contend, on the other hand, that any right which the Crown might by virtue of its prerogative have had at common law over such a harbour is now restricted and qualified by the provisions of the Act. The term "vessel," as defined by s. 2 of the Act, would include such a vessel as this coal hulk; it is admitted, indeed, that she has no internal means of propulsion on board, but the "vessel," as defined by this Act, is not confined to a vessel capable of propulsion by internal means. *Hedges* v.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

London and St. Katharine Dock Co. (1) turned on a differently-worded Act.

[*Sir Rufus Isaacs, S.-G.* For the present purpose it will not be contended that the *Persia* was not a "vessel" within the meaning of the Act.]

The Act limits the Crown's power of management and control in respect of the harbour. First, by s. 3, the Crown may by Order in Council define the limits of a "dockyard port," which means any port, harbour, haven, roadstead, sound, &c., in or near which the Crown has any dock, dockyard, &c.; and by s. 4 it is provided that "the Admiralty may from time to time appoint for each dockyard port a fit person to superintend the execution of this Act, and otherwise to protect the port, to be called the Queen's harbour-master for the respective port." By s. 5, "In relation to any dockyard port it shall be lawful for Her Majesty in Council from time to time to make regulations for all or any of the following purposes; namely, To prohibit the mooring or anchoring of vessels so as to obstruct navigation into, in, or out of the port: To appropriate any space as a mooring place or anchoring ground for the exclusive use of Her Majesty's vessels, but not so as to authorize any user of such space in such manner as to obstruct navigation into, in, or out of the port . . . . And for such other purposes as from time to time seem necessary with a view to the proper protection of Her Majesty's vessels, dockyards or property, or to the requirements of Her Majesty's naval service." It may be observed that by s. 14 any vessel laid by or neglected as unfit for sea service shall not be permitted to lie within any part of a dockyard port specified in this behalf in any Order in Council under this Act, and the harbour-master may cause every such vessel to be removed from the part of the port so specified. The effect of the provisions of the Act is to limit the powers of the Crown in respect of the harbour in two ways. First, the Act constitutes the harbour-master appointed under it an independent statutory authority to carry out the provisions of the Act, and, secondly, the Act provides that regulations for the management of the port shall be established by Order in Council made under the

(1) (1885) 16 Q. B. D. 597.

statute. The Act clearly recognizes the right of a merchant vessel to be in certain parts of the port, and the regulations made by Order in Council under the Act must, it is submitted, be clearly restrictive of the common law powers which the Crown had by virtue of its prerogative. If the harbour is full, the harbour-master may prevent a vessel from coming in or may turn one out; but if the harbour is not really full (which is the basis of the plaintiffs' contention here), then the vessel has a right to be in such part of the harbour as is not appropriated to His Majesty's vessels. The harbour-master does not act under the directions of the Admiralty as a mere servant of the Crown, but as an independent statutory official to superintend the execution of the Act and enforce the provisions of the Order in Council as between the Crown and the public using the harbour.

This question must not be approached on the footing that the public has no right in such a port or harbour as Portland. It is laid down in Blackstone's Commentaries (16th ed.), p. 264, that "though the King had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandise in any part of the haven: whereby the revenue of the customs was much impaired by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11 and 13 & 14 Car. 2, c. 11, s. 14, which enable the Crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandise." In Hale's De Jure Maris, part 2, De Portibus Maris (1), there is no indication in any of the passages dealing with the rights of the public to resort to and use havens and ports for the purposes of navigation and commerce, and for purposes ancillary thereto, that these rights are subject to any limit except that such user must not create a nuisance; whether any user amounts to a nuisance is a question of fact. If it is for the public benefit, in the sense that it is in the interests of commerce and the mercantile marine, that there should be up-to-date facilities for the supply of coal in a harbour,

(1) Hargrave's Law Tracts, pp. 45 et seq.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

somebody must have the right of supplying those facilities. Obviously, the owners of ships which require such coal might provide for a supply on their own account, and it follows that owners of collieries must have a similar right. There is no reason for limiting the rights of the public to the single class of shipowners; the result of so doing would be unduly to favour shipowners in a large way of business owning lines of steamships, who could provide such facilities for themselves, whereas shipowners in a small way could not. If, as a matter of form, it is necessary to join the Attorney-General as representing the public in such an action as this, the plaintiffs are prepared to apply for such an amendment and to bear any costs which may be imposed as a condition thereof.

The Dockyard Ports Regulation Act, 1865, s. 5, necessarily imports a limitation of the original prerogative of the Crown, for it acknowledges the existence of a right in merchant vessels to moor or anchor in the harbour, subject to the regulations made by the Order in Council; and though it provides that the harbour-master may appropriate a space as a mooring place or anchoring ground for the exclusive use of Her Majesty's vessels, that is not to be done so as to authorize any user of such space which may obstruct navigation into, in, or out of the port. This clearly indicates that the harbour-master cannot, either by direction of the Crown or of his own motion, interfere with the public right to use the harbour, except in conformity with the provisions of the Act, and so far as may be necessary for carrying out its provisions. The express mention of the powers specified by s. 5, which the Crown can only exercise through an Order in Council, upon a fair construction of the section, impliedly excludes any other powers which the Crown may theretofore have had by virtue of its prerogative. Sect. 11 of the Act is of importance as shewing under what circumstances the harbour-master may remove a vessel from the harbour, and that he has no right of so removing a vessel except "in conformity with an Order in Council under the Act." By the schedule to the Order in Council area A was appropriated for the use of the Navy, area B was appropriated for a torpedo range, and although area C was not reserved exclusively for private

vessels, they are to have a right to anchor therein. The appropriation of part of area C as an addition to the torpedo range was not only not authorized by the Order in Council, but was contrary to its provisions. The harbour-master may have power to refuse to allow a private vessel to anchor or remain in the area C if in the exercise of a reasonable, and not an arbitrary, discretion he decides that there is no room for her, but he cannot do so merely because the Admiralty is of opinion that there is no room and directs him to remove her, as was admittedly the case here. The discretion given to the harbour-master may be administrative and not judicial in its nature, but he cannot act arbitrarily or merely on the strength of orders given by the Admiralty: see per Lord Halsbury in *Sharp* v. *Wakefield*. (1) If the Act gives the harbour-master no discretion in the matter, the conflicting claims of the Crown and the owners of private vessels must be determined by the facts as regards the question whether there is in truth room for the particular vessel or whether her presence would be a nuisance. Having regard to the addition to the torpedo range being unauthorized and to the evidence as to the nature of the existing arrangements in the harbour, the proper conclusion is that in point of fact there was room for the *Persia* in Portland Harbour.

With regard to the clauses of the Order in Council, the learned judge below held that "subject to the direction of the King's harbour-master" in clause 16 means that the merchant vessel can only anchor in area C if the harbour-master gives her permission to do so, but that is not the natural meaning of the regulation. It implies that, the vessel having a right to anchor there, that right is subject to the directions of the harbour-master as to time and place and manner of doing so. The same considerations apply to other clauses of the Order empowering the harbour-master to give directions. The question whether in point of fact the presence of the *Persia* was a nuisance or obstruction to the harbour must be determined by reference to the consideration that the area added to the torpedo range, and a portion of area C exclusively reserved for the purposes of the Navy contrary to the Order in Council, ought to be open to

(1) [1891] A. C. 173, at p. 179.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

merchant vessels; and also to the consideration that a reasonable alteration of the present unsatisfactory and inefficient arrangements would give sufficient room for the *Persia*. In *Rex* v. *Russell* (1) it was held that the erection of staiths in a navigable river by the defendant was justifiable, if the abridgment of the right of passage occasioned thereby was for a public purpose and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river. In conclusion, it is submitted that the business carried on by the appellants of supplying coal to merchant vessels from a coal hulk moored in Portland Harbour is a legitimate user of public waters, and that upon the circumstances of the case the right of the appellants so to carry on their business has not been abused or used to excess in extent so as to be a nuisance. [They also cited *The Excelsior* (2); *Dick* v. *Badart Frères* (3); *Amalgamated Society of Railway Servants* v. *Osborne* (4); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (5); *Attorney-General* v. *Terry* (6); *Original Hartlepool Collieries Co.* v. *Gibb* (7); *Booth* v. *Ratté* (8); *Attorney-General* v. *Wright* (9); *Anon.* (10); *Blundell* v. *Catterall* (11); *Malcomson* v. *O'Dea* (12); *Gann* v. *Free Fishers of Whitstable* (13); *Foreman* v. *Free Fishers of Whitstable* (14); *Fitzhardinge* v. *Purcell.* (15)]

Sir Rufus Isaacs, S.-G., and *B. A. Cohen*, for the defendant. The plaintiffs have failed to establish a right in law to permanently moor a coal hulk in Portland Harbour. It is undisputed that the property in the bed of the harbour is in the Crown, and there is no suggestion of a grant from the Crown giving the plaintiffs any better right than that possessed by any

(1) 6 B. & C. 566.
(2) (1868) L. R. 2 A. & E. 268.
(3) (1883) 10 Q. B. D. 387.
(4) [1910] A. C. 87, at p. 96.
(5) [1892] 3 Ch. 242.
(6) (1874) L. R. 9 Ch. 423, at pp. 425 et seq.
(7) (1877) 5 Ch. D. 713.
(8) (1890) 15 App. Cas. 188, at p. 192.
(9) [1897] 2 Q. B. 318.
(10) (1808) 1 Camp. 517.
(11) (1821) 5 B. & Ald. 268.
(12) (1863) 10 H. L. C. 593, at p. 618.
(13) (1865) 11 H. L. C. 192.
(14) (1869) L. R. 4 H. L. 266, at p. 283.
(15) [1908] 2 Ch. 139.

other member of the public. This is a case in which the plaintiff company is claiming to assert a right which, as claimed, is a right in itself as an individual as distinguished from the assertion by the Attorney-General of a right in the general public; it is, however, a right as a member of the public that is in reality contended for, and there is no case in which an individual has successfully asserted a public right without the intervention of the Attorney-General. Apart from rights of fishery, the only right of the public in navigable waters, including harbours, is the right of navigation, including anchoring and all that is incidental to navigation. The right is confined to a ship eundo, redeundo, et morando, but the delay or waiting expressed in the term "morando" must be for a purpose incidental to or connected with the navigation of the ship; it would include, for instance, a waiting in the harbour for an expected cargo, which the ship had to carry elsewhere, but not a waiting for a cargo with which to set up a shop in the harbour. The owner of a floating depot has no right at law to come into a harbour and remain there as a stationary shop, subject only to a slight occasional shifting of the position of the ship by the harbour-master; in such a case the object of the ship's coming into the harbour at all is not navigation, but for the purpose of trading. It is not sufficient to say that the owner brings his coal hulk into the harbour for the benefit of the navigation of ships generally; he is none the less carrying on a trade, and a right to be in a harbour can only arise where it is for the benefit of his own navigation. "Victualling" and "refitting" are both incidental to navigation, and, if the plaintiffs' contention is right, any member of the public would have the right to put a floating dock in a navigable stream or harbour, so that vessels might be enabled to refit; no such claim has, however, yet been put forward. A coal hulk is not a necessity for the supply of coal in a harbour; coaling can be, and has for long been, carried on by means of barges. The contention of the plaintiffs seems to have had its origin in certain views expressed by Bayley J. in his judgment in *Rex* v. *Russell* (1), where the defendant, who was indicted for a nuisance, claimed a right to

(1) 6 B. & C. 566.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

erect staiths in a navigable river for loading ships with coals, and the jury were directed to acquit the defendant if they thought that the abridgment of the right of passage occasioned by the staiths was for a public purpose and produced a public benefit, and if the staiths were in a reasonable situation and a reasonable space was left for the passage of vessels on the river; it was held by a majority of the Court of King's Bench that this was a proper direction. But that decision was clearly disapproved in the subsequent case of *Rex* v. *Ward* (1), and was practically overruled in *Attorney-General* v. *Terry* (2), and is not now good law. In any event it is not in point, as it turned upon the question of obstruction, and the contention of the Crown in the present case is that, whether the *Persia* is an obstruction or not, the right claimed by the plaintiffs has equally no foundation in law. The plaintiffs cannot invoke the assistance of the doctrine of public benefit, for if a person does a thing in the assertion of a right which he has not got, the fact that he did it for the public benefit cannot avail him. Even if *Rex* v. *Russell* (3) be good law, the judgment in the present case must be for the defendant. Assuming that in the present case any question as to the balance of public advantage can be material, it is important to inquire within what limits that consideration can operate; giving effect to it within any legitimate limits, the case for the plaintiffs must fail. It is not denied that the term "navigation" in this connection is not confined to coming into and going out of the harbour, but must include the right to remain there for a reasonable period for such purposes as loading and unloading, taking in supplies, and such like. But the right contended for by the plaintiffs on the ground that its existence would be for the public benefit is quite outside anything that can be called "navigation," and there is no decided case in which any such right has been held to exist. To take an illustration: the tendency is for the size of steamers to increase, and therefore to require deeper harbours; could private adventurers take a dredger into a harbour and claim to keep it there for the purpose of maintaining the harbour of a sufficient depth to

(1) (1836) 4 Ad. & E. 384. (2) L. R. 9 Ch. 423.
(3) 6 B. & C. 566.

admit such steamers on the plea that it would be for the public benefit?

[VAUGHAN WILLIAMS L.J. It does not appear to be contended in this case that there could be any right to alter physically the locus in quo, but only to use it as it exists.]

The plaintiffs have claimed that they are entitled to have permanent moorings in the harbour and to remain there for an indefinite period as a coal depot, which is in effect an alteration of the locus in quo. The argument based on *Rex* v. *Russell* (1) breaks down; for that was a case of indictment for a public nuisance, and the point was that the defendants could justify what prima facie was a wrongful act towards the public on the ground that what they had erected was a benefit to the public. No such point arises in the present case. Here the plaintiffs claim a private right as against the Crown on the ground of the right of the general public which is not their right. But, assuming that it is necessary to consider whether, in the language used in some of the cases with regard to nuisances in navigable waters, such as *Rex* v. *Ward* (2), this coal hulk was for the benefit of the port or for the benefit of the public frequenting the port, it is necessary to consider what is meant by those terms in this connection, and where is the alleged necessity for the extension of the rights included in the term "navigation" to meet the modern developments of commerce? Portland is not a commercial harbour in the ordinary sense, but a mere harbour of refuge. There is no trade in commodities there, with the exception of Portland stone, and there are no harbour dues. It has, no doubt, become a place to which steamships resort for the purpose of getting supplies of coal, and it is likewise a dockyard port—that is, a port constructed and used for naval purposes. It cannot be said to be for the benefit of the port that more steamers should resort there, because there are no harbour dues, and the more mercantile steamers resort there, the less the port is available for naval purposes. Then, as regards the benefit to those frequenting the port, inasmuch as it is not a port frequented for commercial purposes, those frequenting the port must apparently mean steamships generally of all the world,

(1) 6 B. & C. 566. (2) 4 Ad. & E. 384, at p. 395.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

independent of nationality. There is no question, therefore, of any benefit to the port or to those frequenting the port in any sense in which those expressions are used in connection with this subject.

As to the effect of the Dockyard Ports Regulation Act, 1865, the provisions of that Act are intended not to limit or restrict the common law rights or prerogative of the Crown, but to supplement them. It is denied that the plaintiffs had any such right as they allege at common law, but, alternatively, it is contended that, assuming that they would have had such a right independently of the Act, the defendant was justified in ordering the removal of the *Persia* as being an obstruction under the Act. The harbour-master appointed under the Act is not a statutory authority with an independent statutory discretion, as suggested by the plaintiffs, but is appointed on behalf of the Crown through the Admiralty. The Act cannot be construed as defining or limiting the rights of the Crown. The words "and otherwise to protect the port" in s. 4 and the title of the "Queen's harbour-master" shew that this is not the scope of the Act. The words of s. 5 must be read in connection with the provisions of s. 6, and, thus read, it is obvious that their object is not to define the rights of the Crown, but merely to define certain statutory offences which shall be summarily punishable by the penalties imposed by s. 6. It is impossible to suppose that the regulations to be made under s. 5 are intended to be exhaustive of the powers of the Crown,—for instance, if it were necessary in time of war the Crown could close the port to navigation,—or to suppose that the Crown is confined to the penalties imposed by s. 6 as a remedy for the acts which are made the subject of those penalties. Even assuming that the powers of the Crown are limited by the regulations made by the Order in Council, it is submitted that under those regulations the defendant, as harbour-master, was justified in removing the *Persia* from the harbour. The regulations make merchant vessels entirely "subject to the directions" of the harbour-master, and, acting either in the exercise of his official discretion or by the direction of the Admiralty, he has full power to remove a vessel from, or prevent her from entering, the harbour. The learned judge in the Court below came to the

conclusion that the defendant had acted bona fide in the matter, and that he could not review his decision to the effect that, under existing arrangements, the *Persia* constituted an obstruction in the harbour.

Leslie Scott, K.C., in reply. The fact that there is no decided case in which the right now claimed by the plaintiffs has been affirmed is by no means conclusive to shew that there cannot be such a right at common law. Assuming for the present purpose that there is now a commercial necessity for the existence of a supply of coal from hulks in Portland Harbour for the purposes of commerce and the mercantile marine, the authorities shew that the common law of England is capable of expansion within certain limits in the sense that principles established at common law are capable of being applied in a novel manner so as to meet the changing circumstances and new developments of life and commerce. Therefore, if it is practically necessary, as a reasonable requirement of the mercantile marine, that Portland should be a coaling station, then, although there may be no previous decision affirming specifically the right now claimed by the plaintiffs, it is competent for the Court to uphold that right by reference to general principles established at common law. That the common law is capable of development in this manner is shewn, among many other decisions, by *Millar* v. *Taylor* (1), *Dashwood* v. *Magniac* (2), and *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt.* (3) [He also cited *Carter* v. *Murcot* (4); *Bolt* v. *Stennett* (5); *Attorney-General* v. *Parmeter.* (6)]

Cur. adv. vult.

July 28. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case the plaintiffs sue for an injunction to restrain Captain C. E. Anson, R.N., harbour-master of the port of Portland, from seizing, taking possession of, or trespassing upon the plaintiffs' steamship *Persia*, lying at her own anchors in Portland Harbour within the area appropriated to merchant shipping, or removing her therefrom.

(1) (1769) 4 Burr. 2303, at p. 2312.
(2) [1891] 3 Ch. 306, at p. 367.
(3) [1893] 1 Ch. 630, at p. 651; [1894] A. C. 535, at p. 553.
(4) (1768) 4 Burr. 2163.
(5) (1800) 8 T. R. 606.
(6) (1811) 10 Price, 378.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Vaughan Williams L.J.

By the points of defence it was alleged that in February, 1903, regulations were made by Order in Council pursuant to the Dockyard Ports Regulation Act, 1865, by which it was provided (inter alia) that moorings for private vessels might be laid with the permission of the King's harbour-master, but were to be removed on his requisition, and that all merchant and other vessels were to be subject to his direction; that in December, 1909, the plaintiffs threatened to moor the *Persia* permanently as a coal hulk without such permission; that the *Persia* was an obstruction to navigation; that the bed of the harbour was the property of the Crown, and that the defendant had a right to remove the *Persia*.

I think that the claim of the plaintiffs in this action is a claim against the defendant (the harbour-master) for obstructing them in the exercise of a public right. I do not think that Portland Harbour is a mere harbour of refuge. In the early history of the exercise by the King of his royal prerogative in respect of harbours, the limits of a harbour, and also the classes of cargoes allowed to be brought into the harbour, used to be referred to a Royal Commission, and in my opinion it is impossible after the Act of 1865, and the Orders in Council made thereunder, to hold that Portland Harbour is a mere harbour of refuge. It is a dockyard harbour, but notwithstanding this it is admittedly a harbour in respect of which ships have the right of navigation and certain incidental rights, such as the right of anchoring and a right of mooring. A question has been raised as to the limits of these incidental rights.

It is clear that all these rights are subject to the directions of the harbour-master. This indeed is admitted by the plaintiffs, but subject to the regulations from time to time made by Order in Council the rights of all ships entering the harbour are equal. The regulations are general regulations binding on all. I take it that the harbour-master could not make a special order that no ships belonging to a particular owner should enter Portland Harbour or navigate in or anchor or moor there, but all ships entering the harbour would have to obey the particular directions of the harbour-master given in respect of navigation, anchoring, and mooring.

It is stated by A. T. Lawrence J. in his judgment that before the arrival of the *Persia* there were ten coaling hulks for the use of merchant ships permanently moored within the merchant shipping anchorage by the permission of the authorities. I do not quite know what permanently moored means. It is difficult to suppose that this permanence of mooring can override regulations 3 or 13 of the regulations for anchoring, berthing, mooring, and breaming in Portland Harbour. Regulation 3 runs thus: "Moorings for private vessels may be laid with the permission in writing of the King's harbour-master, and in such positions as he shall deem fit, but such moorings shall not be laid without such permission, and shall be forthwith removed on the requisition of the King's harbour-master to that effect." Regulation 13 runs thus: "All merchant or other private vessels shall be subject to the direction of the King's harbour-master."

If the coal hulks are really there otherwise than as private vessels subject to the general regulations, it follows such privileged vessels are not exercising a public right, but only enjoying a privilege. No such special privilege has been granted to the owners of the *Persia*, and it must, I think, on the finding of A. T. Lawrence J. be accepted that there was no evidence before him that the ten coaling hulks for the use of merchant ships which were in Portland Harbour before the arrival of the *Persia* were not sufficient to meet the requirements of the port, and we ought to infer not only that the coaling hulks were sufficient to coal the average number of ships calling to coal, but also that Portland Harbour is a recognized harbour for the call of ships to take in from the coal hulks coal furnished not by the Crown, but by the traders who are allowed the special privilege of maintaining a coal hulk. It may be that the Crown as conservator of the port grants these privileges through the agency of its officer, but we have not for the decision of the present case to decide what is the basis of such privileges.

I also accept the finding of the learned judge that the addition of the *Persia* to the ten existing coaling hulks would unduly impede the navigation in and the purposes for which this harbour exists. The evidence of the harbour-master supports this conclusion, and I think that prima facie the decision of the

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Vaughan Williams L.J.

harbour-master should be regarded as conclusive in such a matter.

This, indeed, was not denied by counsel for the plaintiffs. What was said was this: That the presence of the *Persia* as a coal hulk would have been no impediment unless the Admiralty had without any Order in Council excluded private ships and merchant vessels from a portion of the harbour in which by the First Schedule of the Order in Council of February 16, 1903, clause 16, merchant and other private vessels may, subject to the directions of the harbour-master, anchor. I do not think that it was denied by the Solicitor-General that merchant and other private vessels are excluded from a portion of the harbour defined by this Order in Council as anchorage within which, subject to the directions of the King's harbour-master, merchant and other private vessels may anchor. I think myself that such exclusion ought to have been preceded by an Order in Council authorizing the same; but I do not think that the question of the legality of the action of the Admiralty in appropriating to State purposes a portion of Portland Harbour, in which merchant and other private vessels may, subject to the regulations of the King's harbour-master, anchor, can be raised in this action. It can, in my opinion, only be raised by a petition of right or in some action to which the Attorney-General is a party as plaintiff or defendant. I think that, so long as the exclusive occupation by the Crown of this portion of the anchorage for merchant vessels continues, the duty and right of the King's harbour-master are to regulate the shipping within the harbour subject to such occupation. I think, therefore, we must hold that the presence in the harbour of the *Persia* as a coal hulk would tend unduly to impede navigation in Portland Harbour and the purposes for which that harbour exists. I do not think that it is really necessary to decide anything more in order to arrive at the conclusion that this action for an injunction to restrain the harbour-master from removing the *Persia* fails and must be dismissed, but, having regard to the terms of the defence and the observations of A. T. Lawrence J., perhaps I ought to say something as to the right of navigation and its incidents.

The right of navigation manifestly is not limited to the passage

and re-passage of ships with their goods, as to which right Lord Hale says the people have a public interest, a jus publicum,— Hale, De Jure Maris, 36—which must not be obstructed by nuisances or impeached by exactions. There are obviously, as is pointed out by A. T. Lawrence J., incidental rights, such as the rights of stopping, anchoring, &c. Holroyd J., in *Blundell* v. *Catterall* (1), says the right of passage is a right to be exercised for the purposes of navigation, trade, and intercourse. It was argued by Mr. Leslie Scott that in the present case the plaintiffs were entitled to their injunction on the ground that the presence of the *Persia* in that part of the harbour appropriated to merchant and private vessels was no obstruction to the harbour, because although in a sense it abridged the right of passage, yet, as the *Persia* was there for a public purpose, namely, providing incoming steamers with coal, and produced a public benefit, the owners of the *Persia* could not be convicted of nuisance according to the decision in *Rex* v. *Russell*. (2) It was answered, first, that *Rex* v. *Russell* (2) had been overruled by the judgment of Jessel M.R. in *Attorney-General* v. *Terry* (3), affirmed by the Court of Appeal, and, secondly, even if the case of *Rex* v. *Russell* (2) had not been overruled, the presence of the *Persia* as a coal hulk in Portland Harbour was a mere piece of shopkeeping, while it obstructed the passage into and out of the harbour, and conferred no benefit on ships calling at the harbour because the existing hulks maintained in the harbour afforded ample supply of coal to such harbour. I think that this is a good answer, but I cannot agree that *Rex* v. *Russell* (2) has been overruled; it has been modified. Sir George Jessel M.R. in the report of his judgment in the note to the report of *Attorney-General* v. *Terry* (4) says: "I give those as illustrations, but I think it" (that is the doctrine of *Rex* v. *Russell* (2)) "must be confined, as put by Sir William Follett in his argument [in *Rex* v. *Ward* (5)], to cases of public benefit, and not used in too extended a sense." Again in the case of *Rex* v. *Ward* (5) the judgment of Lord Denman, although it disapproves of the judgment of Bayley J.

(1) 5 B. & Ald. 268.
(2) 6 B. & C. 566.
(3) L. R. 9 Ch. 423.
(4) Ibid. at p. 428.
(5) 4 Ad. & E. 384.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Vaughan Williams L.J.

in *Rex* v. *Russell* (1), yet plainly shews that he limited his disapproval to the summing up and judgment of Bayley J., but in no way affirmed that every obstruction to free passage into or out of or within a port would constitute a nuisance if the obstruction made the harbour more convenient for the use of the public using the harbour, and in no way disapproved of the statement of Lord Tenterden, the dissentient judge in *Rex* v. *Russell* (1), that the question would properly be "whether the navigation and passage of vessels on this public navigable river was injured by these erections."

I wish further to say that I do not think that the rights of user by the public are substantially affected by the ownership of the soil of the harbour by the Crown. I should not therefore have based my judgment in this case on trespass. It is sufficient that the plaintiffs so conducted themselves in respect of the presence of the *Persia* in the harbour that the harbour-master was entitled to remove the *Persia* under the harbour regulations made by Orders in Council pursuant to the Act of 1865, and that the authority and discretion of the harbour-master are not suspended by reason of the fact that some portion of the anchorage within which merchant or other private vessels may, under regulation 16 of the regulations of February 16, 1903, subject to the direction of the King's harbour-master, anchor, has been occupied by the King's ships or for the purposes of the Royal Navy without any new Order in Council.

I do not think that in this case any question is raised as to any right of the Crown through the Admiralty or the King's harbour-master to exclude the public or merchant or private vessels, or any particular vessel, from the harbour on the ground that the whole of it is required for the King's ships, or on any other ground. No such right was claimed by the Solicitor-General in his argument, or by the pleadings. The sole question to be decided is whether, under the regulation, the harbour-master had a right to remove the *Persia* from Portland Harbour for disobedience to the directions of the King's harbour-master

I think this appeal must be dismissed with costs.

(1) 6 B. & C. 566.

FLETCHER MOULTON L.J. read the following judgment:—The argument of this appeal has occupied much time, and reference has been made to an exceptionally large number of authorities by counsel for the appellants. But in my opinion the only point to be decided is short and of no great difficulty, and I shall deal with it in limine, although, out of respect to the careful argument on behalf of the appellants and in view of the possibility that the case may go to a higher tribunal, I shall subsequently notice some of the other points that have been raised before us on behalf of the appellants.

Certain admissions by the appellants' counsel have materially circumscribed the matters in issue. In the first place they have formally admitted on behalf of the appellants that the soil of the locus in quo is vested in the Crown. It is therefore unnecessary to examine the statutes which relate to the ownership of the soil or to discuss the general question of the proprietorship of soil situated within the three-mile limit and covered with water at all times. Further, it is not denied that the exercise of the rights of the Crown in connection with the locus in quo is vested in the Lords of the Admiralty, although there is still some controversy between the parties as to the extent and meaning of the interference with their direct control by certain special Acts of Parliament relating to Portland Harbour.

In the next place counsel for the appellants have distinctly formulated the right which they allege to exist and which they seek to establish by the present suit. In the words of the leading counsel it is the right of their ship, the *Persia*, to remain in the harbour of Portland for an indefinite period as a coal hulk in order to supply the plaintiffs' coal from it to those who desire to buy it. The claim on the writ was for an injunction to restrain the defendant from seizing and removing from the harbour the plaintiffs' ship *Persia*. Had such an injunction remained the real subject of the controversy, it would have entailed the examination of questions relating to the circumstances under which the *Persia* came to Portland Harbour, which would have been wholly useless for the purpose of settling the real matter in dispute between the parties. To avoid a costly litigation proving abortive for all useful purposes, the course which the case has

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

taken is such that the issue between the parties is the existence of the right mentioned above. The claim of the plaintiffs that the *Persia* should enter the harbour is to be taken to be an assertion of the existence of that right. Hence, if the plaintiffs are wrong on this point, judgment must be given for the defendant in the action. There is no doubt that the *Persia* is in a certain sense a ship, and that, when it arrived at Portland Harbour, it was being navigated; but there is not, nor has there ever been, any intention on the part of the defendant, the harbour-master, to interfere with the free rights of navigation as possessed by it. Those are not the rights upon which the plaintiffs seek the decision of the Court, and by the very sensible and legitimate admissions which have thus been made the ambit of the controversy is confined to that upon which the parties desire to obtain an authoritative decision.

In my opinion the rights of the owner of soil covered either intermittently or permanently by the sea are well settled. They differ from those of the owner of soil not so covered in this respect only,—that while so covered they are subject to the free exercise by the public and every member of it of the rights of fishing and navigation. The sole question, therefore, is whether the right claimed by the plaintiffs in this action to anchor their ship in the soil of the harbour so as to maintain her as a stationary coal hulk is a right of navigation, for it is needless to say it has nothing to do with any right of fishing. I am clearly of opinion that it is not a right of navigation, and that therefore the plaintiffs' claim cannot be supported in law.

I will proceed to give my reasons for coming to this conclusion. That the public have a right to the free use of the sea for the purposes of navigation has been unchallenged law from the earliest times. It has frequently been enunciated in the form that the sea is a public highway, and that ships have the right eundi, redeundi, et morandi over every part of it, no matter to whom the soil lying thereunder may belong. This method of formulating the right is valuable inasmuch as the legal associations which the conception of a highway calls up are strikingly applicable. In some respects, perhaps, the public rights of user of the sea for navigation are from the nature of the case more

extensive than in the analogous case of a highway. For instance, it is essential to navigation that there should be a free right of anchoring or otherwise securing in position the navigating vessel, and there is nothing strictly analogous to this in the case of a highway. But these and the like differences arise from differences in the circumstances of the case, and not from fundamental differences in the nature of the right. In both cases there is the free right of passage which cannot be limited otherwise than by Act of Parliament, or (in particular cases) by proof of immemorial user. Permanent occupation of any portion by any person to the exclusion of the public is a violation of their rights of free passage. Temporary occupation, except in the exercise of the right itself,—that is to say, except in navigating or performing acts ancillary thereto (which are covered by the right of navigation possessed by the public),—is equally, pro tanto, an exclusion of the public. Neither can be justified by the existence of the right. They are in fact and in law violations of it. In the present case the plaintiffs claim the right of keeping their coal hulk moored in the harbour permanently. It is true that they admit that, under the special Acts regulating the harbour, the defendant, as harbour-master, is entitled to require them to alter their position should it be advisable for the regulation and accommodation of the traffic of the harbour, but this admission does not to my mind affect in any way the nature of the right claimed. The coal hulk is to be there, not in the course of navigation, nor with the intention of its being navigated, but as a stationary structure to be used for the purpose of supplying the plaintiffs' coals to vessels in the harbour. From a legal point of view the case would not be altered in any wise (so far as the right claimed is concerned) if the structure were a floating pier and it were permanently attached to piles driven in the soil. Its presence and attachments are not for the purpose of its navigation, but the opposite. It is a fixed floating shop for the purpose of selling the plaintiffs' coals. This is admitted, but were it not it would be abundantly clear from the evidence. If I mistake not, the engines by which it was brought to Portland have been removed, and though in outward shape it still resembles a ship, I doubt whether it is even entitled now to be

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

called a ship or vessel. Such a permanent occupation of the waters of the harbour of Portland is pro tanto an exclusion of the public, and so far from being the exercise of any public right, it would require some special defence to prevent its being unlawful and open to challenge, either by the Attorney-General on behalf of the public, or by some individual specially affected thereby. Whether such justfication could be found if the Lords of the Admiralty, as owners of the soil, gave their consent is immaterial to this case. It suffices to establish that it cannot be done as of right.

The main argument on behalf of the appellants was that the presence of such a hulk in Portland Harbour for the purpose of supplying coal to steamers frequenting it was a convenience to those steamers, and thus an assistance to navigation. They claimed that it was therefore within the rights of the public to the free use of the water in question for the purposes of navigation. To my mind this is a complete fallacy. The public have, no doubt, the free use of the waters for the purpose of navigation, and this includes the exercise of all rights ancillary thereto. But that means ancillary to that navigation, i.e., to the navigation of the ship navigated. They have, for instance, the right of waiting in a place till the wind or the weather, or probably also the season, permits them to leave it, or until they have obtained a cargo or have completed repairs. In doing all these things they no doubt exclude the rest of the public from bringing their ships to the place where they are moored, just as a man who is lawfully standing on or moving along the public highway prevents any other member of the public being at that moment at the same place on the highway as he is. But all this is in the exercise of the rights of navigation of the ship itself. It is not an occupation of the waters for the purpose of making more convenient the navigation of other ships. I can illustrate the distinction by a parallel case in the use of a highway which to my mind represents accurately the point in issue in the present case. It is no doubt an advantage to travellers on the highway to be able to obtain refreshment; but that would not justify an enterprising caterer erecting a booth on the highway for the purpose of selling refreshment to travellers for profit to himself.

If you add to the simile that the booth had been brought to the locus in quo on wheels which had been subsequently removed when it arrived at the place which it was intended permanently to occupy, the analogy would be complete. No one would venture to contend that such a proceeding was a legitimate use of the highway, and the right claimed by the plaintiffs in this case seems to me to be an analogous use of the highway of the sea and equally unjustified by any rights possessed by the public.

The difficulty of supporting the plaintiffs' claim by basing it on the recognized right of the public to use the waters of the sea as a highway induced the plaintiffs' counsel to put forward the contention that the rights of the public are more extensive than this. His argument, shortly stated, was as follows: Originally the lands flowed over by the sea belonged to the Crown, and were therefore lands held in trust for the benefit of the public. Navigation and fishing, he suggested, are only examples of the ways in which the public can use the sea, and the rights of the public freely to use them for these purposes are only examples of the general principle that they have a free right to use them for all purposes of utility, and that the property in the subjacent lands is subject to this general right. Placing coal hulks in harbours, and supplying coal therefrom, has by reason of the introduction of steam traffic become a convenience to a portion of the navigating public, and therefore the plaintiffs, as members of the public, have a right to put their coal hulk in Portland Harbour and to keep it permanently there for the purpose of thus selling their coal.

I do not think that I have done injustice to the argument of the plaintiffs' counsel in thus expressing it. To my mind it would be difficult to find a worse collection of general propositions more completely without authority or more dangerous from their vagueness and uncertainty. In the first place there is no authority whatever for the proposition that the lands under the sea are subject to any other public rights than those of navigation and fishing. It must be remembered that the right here claimed is one which directly affects the owner of the soil. The fact that it involves the permanent occupation of the water

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

over it would be sufficient to establish this; but in addition it involves mooring or anchoring on the land itself, which is a right much of the same character as a right to drive piles into his land for the purpose of fixing the position of the coal hulk. The plaintiffs therefore set up that the public have a right to do this whenever it can be shewn that a section of the public is benefited thereby. I cannot find any trace of any servitude of this wide description in any legal authority or decision, and a universal silence of this kind is the strongest proof that no such common law right exists. New common law rights cannot be made at the present day. They must ex necessitate rei be of ancient origin. Now it must be remembered that a very large portion of the soil covered by the sea has passed out of the hands of the Crown into those of private persons. If there be any general common law right to use those lands for any purpose convenient to the public in the sense in which this phrase is used by the plaintiffs, it would follow that a third party might erect a jetty on foreshore belonging to some other person and charge tolls for the use of it, and justify his action by evidence that such jetty was a convenience to some portion of the public. That private property could be held and could pass from hand to hand during centuries subject by common law to such a servitude as this without any trace of it being found in any authority is inconceivable. I have here taken the case of foreshore which has passed into the hands of private owners as contrasted with that in which the property still remains in the Crown. I do this because it is more likely that the strict rights of ownership would come into litigation in such a case, and not because I think that there is any difference whatever between the rights of the Crown in such matters and the rights of a grantee from the Crown. In both cases the servitude is and must be by common law, and, if so, it is clear that it solely extends to the rights of the public to the free exercise of navigation and fishing.

But the fundamental fallacy in the argument is the suggestion that public lands are held in trust for the benefit of the public in any sense which would give to individual members of the public any other or different rights with respect to them than they have

with respect to lands in private hands. The phrase "in trust for the benefit of the public" is a very misleading one. These lands actually belong to the nation, and the use to which they are to be put is decided by the authorities whom the nation has chosen, that is to say, the Government controlled by the Legislature. But this fact does not weaken in any way the rights of property in the lands which are possessed and used by the State, nor is a Court justified in being less vigilant in maintaining and enforcing those rights of property in the case of public lands than in the case of those in the hands of private owners. Indeed, if there be any difference, it is not unnatural that we should be disposed to exercise greater vigilance to prevent the filching by private individuals of property that should belong to all, because the danger is greater in such cases than in cases where individual owners are there to defend their own property. I need scarcely point out that the suggestion of the plaintiffs that what they seek to do is to promote the interests of the public is a mere pretence. They are not proposing any philanthropic work, but are simply guided by a desire of gain, which is laudable so long as you do not appropriate other people's property for the purpose of attaining it. They are doing nothing more or less than seeking to get at the public expense a most suitable location for a coal depot, and that without paying for it. The evidence that they put forward to support their contention that what they seek to do is in the public interest is ludicrous. In substance it amounts to saying that if a coal hulk were there established it would be largely used by steamers frequenting the port. That it would be an excellent site for a coal store no one doubts, but if that establishes a right to appropriate public lands for private uses, every successful shopkeeper could make out an equally good case. Exactly similar evidence could be obtained to justify a tobacconist in setting up a tobacco kiosk in front of the Mansion House. If the thing be lawful at all, and it be thought desirable to do it, the Crown might, no doubt, find willing tenants for the locus in quo at substantial rents and turn the possession of the soil into a source of public revenue. As to whether it be lawful or not to set up permanent hulks in a port without parliamentary authority I express no opinion. It probably depends on a question

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

of fact such as that which decides the legality of the erection of piers on a foreshore, namely, whether the presence of such hulks is an impediment to navigation so as to constitute them a nuisance. But beyond all question there can be no right without the consent of the Crown, who are the owners of the land, to station a coal hulk in the harbour and fix it to the soil when ex concessis the intention is not to navigate it, but to keep it stationary.

The only case out of the many quoted in the argument by the appellants which can be said to give a countenance to this contention is the case of *Rex* v. *Russell*. (1) In that case certain colliery owners having pits near the river Tyne erected staiths for the purpose of loading ships with their coal, which projected into the bed of the river, which was tidal and navigable. They were indicted for a nuisance, and in charging the jury the learned judge gave the following direction :—"If you think this [staith] is placed not in a reasonable part of the river, that it does an unnecessary damage to navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If on these points you are of a different opinion, then for the defendants." The questions left to the jury were the following:— Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigating in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals? The jury said that in consequence of this direction they found the defendants not guilty. A rule nisi obtained to enter a verdict of guilty was discharged by the Court, consisting of Bayley J. and Holroyd J. and Lord Tenterden C.J., the latter dissenting. The grounds upon which Holroyd J. supported the direction throw little light on the matter. He bases his decision on the words being "a mere answer to an unfounded suggestion of the prosecutors," and not part of the direction to the jury, and that they were qualified by other parts of the summing up; but it cannot be denied that on the whole he treated the questions as proper ones. Bayley J.

(1) 6 B. & C. 566.

strenuously defended his summing up, and treated such matters as the fact that the coal could be got to the London market more cheaply as a specimen of the public benefit which he considered would be a justification for the erection of the staiths. It is clear that Lord Tenterden C.J. differed entirely from the view that the erection of the staiths could be defended on such grounds, and we know that Littledale J., who heard the argument, but having been consulted in the case when at the Bar declined giving any opinion, agreed with Lord Tenterden C.J.

The authority of this case, which was in such striking contrast with other decisions, was not left long unchallenged. In the argument of *Rex* v. *Ward* (1) Lord Denman C.J. speaks of it as "a case, the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined," and in the judgment of the Court, which he delivered, he decides in a manner directly contrary to the law as laid down in *Rex* v. *Russell.* (2) So far as I know *Rex* v. *Russell* (2) has never been acted upon, and in *Attorney-General* v. *Terry* (3) Sir George Jessel M.R. says of it, "In my opinion that case is not law, and it is right to say so in the clearest terms, because it is not well that cases should continue to be cited which have been virtually overruled, although the judges have not said so in express terms."

At this day, therefore, there can be no doubt that the decision of *Rex* v. *Russell* (2) cannot be regarded as good law. Indeed it is difficult to understand the train of thought which led that eminent judge to frame the questions which he put. For instance, one of the questions left to the jury was whether a reasonable space was left for the public navigating the Tyne. The public navigating the Tyne were entitled to the whole of the space afforded by the river, and such a question as "was there a reasonable space left for the public navigating in the Tyne" is in my opinion unmeaning. But the fundamental error in that case, as in the argument for the plaintiffs in the present case, is the suggestion that you may balance against encroachments upon public rights real or supposed advantages

(1) 4 Ad. & E. 384. (2) 6 B. & C. 566.
(3) L. R. 9 Ch. 423, at p. 426.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

accruing thereby to some section of the public. I agree entirely with the passage in the judgment of Lord Denman C.J. in *Rex* v. *Ward* (1) where he says, "In the infinite variety of active operation always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage." It may be well to sum up the essentials of a justification for an interference with the shores of the sea or the superjacent waters. They are directly deducible from the legal position of those shores. The land is the subject of rights of property, but the public are entitled to the free exercise of the rights of navigation and fishing in the superjacent waters, and this includes the doing of acts ancillary thereto, such as anchoring, &c., even though they directly affect the soil. This being the legal position, it follows that no permanent occupation of the shore, or permanent occupation of the waters over it, can be lawful except by, or by the permission of, the owner of the soil, whether it be the Crown or a private individual. But that would not suffice as a justification if the act would interfere with these dominant rights of the public. This does not, however, carry with it as a legal conclusion that every interference with the soil which affects the navigation is unlawful. For instance, to blast away a dangerous rock does not injuriously affect the rights of the public. Similarly the erection of a groyne which prevents the silting up of a useful channel, or the erection of a pier which gives shelter in rough weather, may benefit and not injure navigation. Hence from of old the question whether any interference with the foreshore is a nuisance, i.e., an injury to the

(1) 4 Ad. & E. 384, at p. 404.

public, has always been treated as a question of fact, and the same principle must apply to lands permanently covered by water, such as the soil of this port.

The issue to be decided in every case is whether the act done injures any right of the public. If it does so it is unlawful. You cannot lump together all the rights of the public and defend yourself by contending that on the whole you have been a benefactor. No balancing of benefit to one right against injury to another is permissible; the benefit and the injury must be to the same right, and the benefit must outweigh the injury. Each member of the public is entitled to enjoy to the full each of the rights of the public, and without legislative authority you can no more interfere with one right and justify by alleging a benefit to another in the case of rights vested in the public than in the case of rights vested in private individuals. To my mind in the present case every essential element of such a justification is absent. The unauthorized interference with the soil of the port alone would suffice to defeat the plaintiffs' claim. But there is also, in my opinion, an unjustified interference with the rights of navigation. To take up the position in the harbour that the *Persia* seeks to take would, under present circumstances, cause an obstruction to navigation, and whether or not the other coal hulks are lawfully there the plaintiffs can have no right to have them disturbed in order that their hulk may be introduced into the harbour for a like purpose and thereby, as the plaintiffs clearly hope, take away the trade of those at present there. If any such right of permanent occupation exists as the plaintiffs seek to establish it exists for those coal hulks already there, and as they have occupied the ground the introduction of the *Persia* cannot be justified, inasmuch as rebus sic stantibus it would be admittedly an obstruction to the navigation.

I do not propose to deal with any of the other cases which were quoted because I do not think they really bear upon the issue in this case. Nor do I think that any discussion as to the action of the defendant as harbour-master, or the exact powers which he possessed as such, is material. Beyond question he was the accredited agent of the Board of Admiralty, in whom the management of this portion of the rights of the Crown was

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Fletcher Moulton L.J.

vested, and if, as in my opinion is the case, the attempt to occupy a place in Portland Harbour with this coal hulk as a stationary storehouse and loading stage for coal was a trespass on the rights of the Crown, it is clear that he was justified in what he did apart from any special authorization under the Act. But all these matters are beside the true question and I shall not dwell on them. I agree with the very clear judgment of the learned judge in the Court below with regard to them, but it is upon the ground that the right contended for by the appellants does not exist that I base my decision that the action was rightly dismissed by him, and that this appeal should be dismissed with costs.

BUCKLEY L.J. read the following judgment:—Is a coal merchant entitled, in exercise of a public right, to introduce a floating structure into Portland Harbour and there maintain her for the purpose of coaling steamships in the course of his trade? Can he justify his act as an act incidental to navigation? That is the question for decision in this case. I have not said "permanently maintain" because the appellants do not contend that they can maintain the coal hulk permanently in the sense that they can insist upon a right to remain under all altered future circumstances. But they do assert a right to maintain their coal hulk there permanently in the sense that, so long as an altered state of circumstances does not justify their exclusion on the ground of the vessel becoming an obstruction to navigation, they are entitled to remain permanently, not necessarily in the same place, but in that or some other place as directed by the harbour-master.

On the one hand the soil of Portland Harbour is in the Crown. This proposition the appellants do not dispute. On the other hand the ownership of the Crown is for the benefit of the public, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation which belongs by law to the subjects of the realm. The right of the public freely to navigate in navigable waters is a right to which the right of the Crown in the soil is subservient. These propositions are not disputed by the respondent. In support of them I may refer to

Gann v. *Free Fishers of Whitstable* (1) and *Foreman* v. *Free Fishers of Whitstable*. (2)

These waters are navigable waters. Portland Harbour is a dockyard port within the Dockyard Ports Regulation Act, 1865. It is in these waters that the appellants assert the right which they claim. The proposition which they put forward is that so long as they do not cause an obstruction in the port they, as members of the public, and in exercise of a public right, are entitled to enter the harbour and maintain there permanently (subject to such qualifications as above stated) a coal hulk for the purpose of supplying coal. The contention may perhaps be stated thus: "A coal hulk is a 'vessel' both at common law and within the definition in the Dockyard Ports Regulation Act, 1865." (The latter proposition the Solicitor-General for the purposes of this case does not contest in argument.) The appellants go on to say, "Portland Harbour is navigable water: our coal hulk is a vessel: she is entitled to enter navigable waters. The rights of a vessel in navigable waters are not confined to navigation. A vessel is entitled to use them eundo et redeundo et morando so far as necessary or reasonable. We can use them morando for the purposes of our trade. It is a trade useful to navigation. The right which we claim is a legal right." They say, and with truth, that legal principles are from time to time to be applied to altered circumstances, and that although there is not to be found in the books any instance of such a claim as they here make, yet the extension of steamship navigation and the increasing necessity for obtaining supplies of coal justify the application of an old principle to a new state of circumstances and authorize the appellants to use these navigable waters morando for the purpose of supplying coal. This is the first and cardinal proposition in the case. It rests, in my opinion, upon a fallacious ground. I will assume for a moment, without staying to discuss it, that the increasing necessity for the supply of coal may give to the public who are engaged in navigation a right as against the Crown to assert that the Crown must allow the establishment of such a number of coal hulks as is reasonably necessary for the assistance of the navigating public in

(1) 11 H. L. C. 192, at p. 207. (2) (1869) L. R. 4 H. L. 266, at p. 283.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Buckley L.J.

exercising rights of navigation. This right, if it exists, is a right in persons requiring coal to have depots established sufficient to meet their requirements. That is not the right which the appellants are asserting. They are asserting a right in the seller of the coal to maintain depots to give such a supply. Assume for the moment that it is the fact that the navigating public resorting to Portland Harbour do not find there sufficient coal hulks: who would be the suppliant upon a petition of right or other process to assert against the Crown that more coal hulks ought to be allowed to go there? Obviously the navigating public who want the coal. A coal merchant who wants to establish coal hulks to sell coal is not for that purpose a member of that public. I know of neither authority nor principle to support the contention that a trader who is desirous of extending his trade is entitled to appropriate a portion of navigable waters for the purpose of furthering that ambition. There is a passage in Lord Denman's judgment in *Rex* v. *Ward* (1) so pertinent to this consideration that I cannot forbear to quote it. "No greater evil" (says Lord Denman) "can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy." It would be easy to give illustrations of services useful to navigation which persons might for their own profit be desirous of establishing in navigable waters, say, depots for victualling ships, floating docks for refitting ships, naval schools for instructing persons in navigation. But nobody ever heard or could reasonably suggest that included in the public right of navigation is any right to establish any such depots as these because their turn-out would be useful to navigation. The contention of the appellants in fact is as follows. "True it is," they say, "that we do not want to navigate. But others do. They want coal. We can supply it, and supply it much more efficiently than the coal hulks already in the harbour. We have a public right to go there and render a better service to the navigating public." An argument of this kind was in fact

(1) 4 Ad. & E. 384, at p. 404.

involved in *Rex* v. *Russell* (1) and was repudiated in *Rex* v. *Ward* (2) and *Attorney-General* v. *Terry*. (3) The case of *Attorney-General* v. *Wright* (4), which the appellants sought to use in support of this contention, decides only that a right in the public, or a section of the public, to have in navigable waters a fixed mooring in the soil of another to which they may from time to time resort in exercise of rights of navigation is a right known to the law. I fail to see that it assists the appellants' contention. In the first place the right here claimed is not a right to fixed moorings, as distinguished from moorings generally. The appellants do not assert that they are entitled to remain in a definite place. They claim the perpetual right to moor from time to time at some place within a defined area; and, secondly, the defendant does not deny that such a right as was successfully asserted in *Attorney-General* v. *Wright* (4) is known to the law, but says that the appellants are claiming to have this mooring, not in exercise of any rights of navigation of their own, but as incidental to the right of navigation of others. I agree that in the expression "rights of navigation" the word "navigation" is used in a wide sense and includes a large number of acts incidental to navigation. But the right claimed must be a right incidental to the navigation of the party claiming the right and not a right incidental to the navigation of others. Here the appellants are claiming as an act incidental to navigation something which is not at all incidental to their own navigation, for they have none, but an act incidental to the navigation of others, namely, their customers for coal. Taking a supply of coal may be, but dealing in the sale of coal is not, an act incidental to navigation. In my judgment the first and cardinal proposition with which the appellants start cannot be maintained. There is, I think, no right in a trader to establish himself in navigable waters for the purposes of his trade whether there does or does not exist a right in the navigating public to have such a trader introduced for their advantage.

I ought to add that upon the question of fact the learned judge states that there was no evidence before him that the

(1) 6 B. & C. 566.
(2) 4 Ad. & E. 384.
(3) L. R. 9 Ch. 423.
(4) [1897] 2 Q. B. 318.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

Buckley L.J.

ten coaling hulks already in the harbour were not sufficient to meet the requirements of the port, and that the defendant had received no complaint of their inefficiency, and he came to the conclusion as a fact that the harbour-master and the Admiralty had formed the opinion that the existing coal hulks were sufficient, and upon the evidence he agreed with them.

The fact is that the decisions upon which the appellants rely, upon this their main proposition, were cases in nuisance and not in trespass. They decide nothing upon the contention that, nuisance or no nuisance, the coal hulk has no right to be there—that the right she asserts is not a right of navigation. For the purposes of this judgment I am prepared to assume for the moment that the mooring of the *Persia* was not such an obstruction of the port as that the harbour-master was entitled to call upon her to withdraw as being a nuisance to the public rights of navigation. The appellants made complaint of the extension of the torpedo range over part of the area in which merchant vessels might anchor, and of other acts which diminished the area available for vessels of that class. To my mind all this is immaterial. If the *Persia* had not the right which she claimed it is not relevant to say that a larger area than remains devoted to merchant vessels ought to be so devoted.

The *Persia* in fact entered the port under her own steam, but the appellants, rightly enough, do not contend that she entered it otherwise than for the purpose of establishing herself in the port as a coaling hulk. For the reasons which I have given her original entry was, in my judgment, wrongful; she did not enter in exercise of any right of navigation of her own, but in assertion of an alleged right arising from assistance given to the navigation of others. But if, contrary to my opinion, I assume that a coaling hulk might come into the port, it by no means follows that the harbour-master had not the right of calling upon her to leave. His powers under the Act of Parliament (see s. 4) are not only of superintending the execution of the Act of 1865, but include the duty "otherwise to protect the port." The Act of 1865 does not, I think, limit the prerogative of the Crown, and that prerogative might, I think, in the facts of this case, be exercised by the harbour-master, who plainly took his orders from and

acted under the directions of the Admiralty. A material circumstance is that if larger provision were made for enabling steamships to bunker coals in Portland Harbour the result might be to create a demand which does not at present exist. That is, of course, the appellants' object. They are desirous of establishing themselves there because it is a good place for their trade. There are no harbour dues. Steamships in increased numbers may be, and they hope will be, attracted by the facilities for obtaining supplies, and thus they are going to use their establishment in the harbour to increase the flow of merchant and private vessels to that place. Regulations 13 and 16 in the First Schedule to the Order in Council of February 16, 1903, have, I think, the following effect. There is no condition precedent to the right of merchant and private vessels to anchor in the merchant ship anchorage; in doing that act, however, they are subject to the directions of the harbour-master. The language of these regulations differs significantly from that of regulations 14 and 15. Nos. 14 and 15 reserve exclusive use of certain portions of the harbour for His Majesty's ships, and for the torpedo range, unless the permission of the harbour-master be given to other vessels. No similar right is given to merchant or private vessels, but they are allowed to come to the anchorage appropriated to them subject to the directions of the harbour-master. Under these regulations the harbour-master could not, I think, exclude generally merchant or private vessels, but he can, I think, exclude a particular ship under particular circumstances. He might, for instance, exclude a particular ship seeking to enter bona fide as a navigating vessel if the port was already full, and he may exclude a coal hulk seeking to enter as a coal hulk if there are already sufficient coal hulks. Whether in exercise of the prerogative of the Crown, or under his power derived from the Act and the Order in Council made under the Act, there resides, I think, in the harbour-master a right which enables him, even if the coal hulk had, as I think she had not, a right to come in, to call upon her to go out again upon reasonable grounds, as, for instance, that there were already sufficient coaling hulks in the harbour, and that he would not have more.

C. A. 1910

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON.

The claim which the appellants have made seems to me to be not only novel, but of a character which I will not go further than describe as courageous. It is an assertion of a right wholly unknown, as I think, to the law. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Lightbound, Owen & MacIver.*
Solicitor for defendant: *Solicitor to the Treasury.*

W. J. B.

1910

Oct. 26.

BIDDELL BROTHERS *v.* E. CLEMENS HORST COMPANY.

Sale of Goods—C. i. f. Contract—"Terms net cash"—Right of Buyer to Inspection before Payment—Payment against Shipping Documents—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18 (*r.* 5), 28, 34.

A contract in writing for the sale of 100 bales of choice brewing Pacific Coast hops of each of the crops of the years 1905 to 1912 inclusive, to be shipped to Sunderland, provided that the buyer "shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull. Terms net cash." The buyer contended that he was not bound to pay for the hops until their arrival at their destination and a reasonable opportunity had been allowed to him for examination to see if they were in conformity with the contract:—

Held, that the seller was entitled to payment against shipping documents upon delivery of the hops on board ship at the port of shipment, the buyer's right to reject the hops remaining unimpaired if upon arrival they were found upon examination not to be in conformity with the contract.

TRIAL of action in the commercial list before Hamilton J. without a jury.

The action was brought to recover damages for alleged breaches of two contracts, dated respectively October 13, 1904, and December 21, 1904.

The first contract, which was made at Sunderland between the defendants, of San Francisco and London, parties of the first part, and Vaux & Sons, Limited, of the city of Sunderland, parties of the second part, provided that "the parties of the first part agree to sell to the parties of the second part one

hundred (100) bales, equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905 to 1912 inclusive.

"The said hops to be shipped to Sunderland.

"The parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull (tare 5 lbs. per bale).

"Terms net cash.

"It is agreed that this contract is severable as to each bale.

"The sellers may consider entire unfulfilled portion of this contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder or if this contract or any part of it is otherwise violated by the buyers.

"Time of shipment to place of delivery, or delivery at place of delivery, during the months (inclusive) of October to March following the harvest of each year's crop.

"If for any reason the parties of the second part shall be dissatisfied with or object to all or any part of any lot of hops delivered hereunder, the parties of the first part may, within thirty days after receipt of written notice thereof, ship or deliver other choice hops in place of those objected to."

The second contract was between the same parties, and in the same terms, except that it provided for the sale by the defendants to Vaux & Sons, Limited, of fifty bales of British Columbian hops equal to or better than choice Pacific Coast hops of each of the crops of the years 1906 to 1912 inclusive; c. i. f. to London.

Upon August 11, 1908, Vaux & Sons, Limited, assigned for value to the plaintiffs all their rights and benefits under the two contracts, and express notice thereof in writing was given by the plaintiffs to the defendants.

Correspondence passed between the parties as to the shipment of the 150 bales of the 1909 crop, and on January 29, 1910, the defendants wrote to the plaintiffs stating that they were ready to make shipment of the 150 bales of the 1909 crop of the contracted quality, and that "for the invoice price less freight we will value on your good selves at sight with negotiable bills

1910

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

of lading and insurance certificates attached to draft, and if you wish we will also attach certificates of quality of the Merchants' Exchange, San Francisco, or other competent authority to cover the shipment." On February 1 the plaintiffs replied that they were prepared to take delivery on the terms of the contracts, and that it was "in accordance with the universal practice of the trade and the custom adopted by you in your dealings with other purchasers of your hops, and it has also been your custom with our assignors to submit samples, and the samples having been accepted to give delivery in bulk in accordance with the samples; but if you decline to adopt the usual and undoubtedly most convenient course, we can only pay for the hops against delivery and examination of each bale. We cannot fall in with your suggestion of accepting the certificate of quality of the Merchants' Exchange, San Francisco." On February 5 the defendants' solicitors wrote to the plaintiffs' solicitors that the refusal of the plaintiffs to pay for the hops except upon terms which were not in accordance with the contracts was a clear breach of the contracts by the plaintiffs, and, that being so, the defendants would not now ship to the plaintiffs the 150 bales of the 1909 crop, and they reserved all their rights in respect of the breach of contract by the plaintiffs.

Upon March 11, 1910, the plaintiffs issued the writ in this action claiming damages for breach of contract in refusing to ship or deliver the 150 bales of hops. The defence, after stating that the defendants raised no defence with reference to the assignment of the agreements, alleged that, by reason of the plaintiffs' violation of the entire unfulfilled portion of the agreements in refusing to pay for the hops in accordance with the terms of the agreements, the defendants were entitled to refuse to further perform the agreements, and they counterclaimed against the plaintiffs for damages for breach of contract in refusing to take and pay for the 150 bales of hops.

Leslie Scott, K.C., and *Eustace Hills*, for the plaintiffs. It is contended on behalf of the defendants that under a c. i. f. contract payment is to be made against tender of the documents. That may be so if there is an express term in the contract which

makes the price of the goods so payable. The expression c. i. f. standing alone is merely a means of calculating the price to be paid for the goods by adding together the various items of which the price is composed. This is clear from the observations of Blackburn J. in advising the House of Lords in *Ireland* v. *Livingston*. (1) The letters c. i. f. have nothing to say to delivery. Delivery to a carrier is sometimes deemed to be delivery to the buyer—Sale of Goods Act, 1893, s. 32—but not in the case of a contract of sale where the buyer is to have a reasonable opportunity of inspecting the goods. Sects. 27—34 of the Act deal with delivery of the goods. They do not deal with the transfer of property as between buyer and seller. Transfer of property in the case of the sale of unascertained goods is dealt with in ss. 16 and 18 (r. 5) of the Act; and by s. 20, unless otherwise agreed, when the property in the goods is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not.

The obligation to pay for the goods is independent of the question as to the person at whose risk the goods are, and does not arise until delivery of the goods: Sale of Goods Act, 1893, s. 28. Unless there is some special agreement varying the provisions of the Act, the buyer is not bound to take delivery of the goods until he has had an opportunity of inspecting them for the purpose of seeing whether they are in conformity with the contract—*Isherwood* v. *Whitmore* (2); *Startup* v. *Macdonald* (3); Sale of Goods Act, 1893, s. 34—and that can only be upon arrival of the goods. There must therefore in such a case as this be an appropriation of the goods to the contract and a delivery to the buyer with a reasonable opportunity of inspecting them before the obligation to pay arises. The obligation to pay does not arise at the moment the goods are at the buyer's risk, but arises at a later time. If the goods are lost on the voyage, then, no doubt, as they are at the buyer's risk, he must pay for them. That, however, is an exceptional case. In the absence of an express stipulation in the contract that payment shall be made

(1) (1872) L. R. 5 H. L. 395, at pp. 406, 407.

(2) (1843) 11 M. & W. 347.

(3) (1843) 6 Man. & G. 593, at p. 610.

1910

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

against tender of the documents the buyer is entitled to have an opportunity of inspecting the goods before being called upon to pay for them. In the present case there is nothing in the contract to exclude that ordinary rule of law. There is no stipulation that there shall be cash against documents. Further, the other terms of the contract shew that this is what the parties intended. The defendants therefore committed a breach of contract by refusing to ship the hops unless they were paid the price as against the documents, and are liable in damages to the plaintiffs. [They also referred to *Bowes* v. *Shand.* (1)]

J. R. Atkin, K.C., and *G. Wallace*, for the defendants. This being a c. i. f. contract "terms net cash," the contract is performed by the seller shipping goods of the description specified in the contract and by tendering to the plaintiffs the documents representing the goods and the policy of insurance. Upon that being done the plaintiffs are bound to pay for the goods. "Terms net cash" in a c. i. f. contract of sale means net cash against documents. The buyers might have stipulated that they should have an opportunity of examining the goods on arrival in this country before paying for them, but they have not done so.

When the goods under such a contract as this have been shipped and the shipping documents tendered to the buyer, the goods are then at the risk of the buyer and the property in them has passed to him, and he must then pay for them. It is either a delivery of the goods to the buyer within s. 28 of the Sale of Goods Act, 1893, which provides that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," or the contract otherwise provides by impliedly stipulating for payment against the documents. Though the payment has to be made against the shipping documents, the buyers have still a right to reject the goods if upon arrival they are found not to be in conformity with the contract: *Polenghi* v. *Dried Milk Co.* (2); *Crozier, Stephens & Co.* v. *Auerbach.* (3) The plaintiffs therefore broke the contracts by refusing to pay for the hops before their arrival and inspection in this country.

(1) (1877) 2 App. Cas. 455. (2) (1904) 10 Com. Cas. 42.
(3) [1908] 2 K. B. 161, at p. 167.

They refused to pay for the hops in accordance with the terms of the contracts, and they cannot sue the defendants for breach as they were not ready and willing to perform their part of the contracts. The defendants were therefore, both under the terms of the contracts and at common law, entitled to refuse to deliver the hops: *Withers* v. *Reynolds* (1); *Mersey Steel and Iron Co.* v. *Naylor*, *Benzon & Co.* (2) The plaintiffs having broken the contracts, the defendants are entitled to recover damages for the breach.

Leslie Scott, K.C., in reply. In both *Polenghi* v. *Dried Milk Co.* (3) and *Crozier, Stephens & Co.* v. *Auerbach* (4) there was an express term in the contracts that payment was to be made against the documents. If the defendants had wished to deprive the plaintiffs of their right to inspect the goods before paying the price they should have expressly so stipulated in the contracts.

HAMILTON J. This is an action upon two contracts, between Vaux & Sons, Limited, as buyers, and the defendants, as sellers, made in 1904, and in 1908 assigned by Vaux & Sons to the plaintiffs for value, for the sale annually, till 1912, of one hundred bales of choice brewing Pacific Coast hops and fifty bales of British Columbian hops, a scarcer and superior variety. The hops were to be shipped to Sunderland, and the buyers were to pay for the hops at the rate of 90*s.* per 112lbs., c. i. f. to London, Liverpool, or Hull (in the second contract to London); "terms net cash." No question is raised as to the calculation of the freight being to London, Liverpool, or Hull, while the shipment is to be to Sunderland. The dispute between the parties arose out of the terms of the contracts as to the payment of the price and with reference to the 1909 shipment. The plaintiffs say that the price is not to be paid until they have had an opportunity of examining the shipment, which cannot be until its arrival in this country; the defendants, that the obligation is to pay against tender of the shipping documents, whether the hops have arrived or not. The plaintiffs expressly stated in the

(1) (1831) 2 B. & Ad. 882.
(2) (1884) 9 App. Cas. 434, at p. 442.
(3) 10 Com. Cas. 42.
(4) [1908] 2 K. B. 161.

1910

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Hamilton J.

correspondence that they did not intend to take delivery of the 1909 shipment except upon the terms of payment for which they now contend, and therefore, if they are wrong in that contention, the defendants were relieved from the obligation to tender the hops, and the plaintiffs broke the contracts as regards that particular shipment. The shipments for 1910 and following years are not affected by the refusal to take delivery in the present case.

The defendants, the sellers, say that the stipulation in these contracts, "terms net cash," means net cash against documents. The plaintiffs, the buyers, say that if that were intended it would have been easy to have said so. The circumstance that the contracts might have been made quite clear by apt words does not assist me in interpreting them as they stand. "Terms net cash," in the absence of proof of trade custom or trade meaning, imports only that there is to be no credit and no deduction by way of discount, rebate, or otherwise, and one must look primarily at the contract to pay to see what are the circumstances under which payment is to be made. The contract is to pay "for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull," and the meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on

(1) L. R. 5 H. L. at p. 406

board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case payment before the arrival of the goods in this country was involved.

It is said that s. 34 of the Sale of Goods Act, 1893, requires that before the delivery can be one in accordance with the contract, against which the price must be paid, the seller must afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. It is well settled law, and the case of *Polenghi* v. *Dried Milk Co.* (1) affords an instance of it, that where, either by the express terms of the contract or by implication from the letters c. i. f. in the contract, payment has to be made against documents, the buyer's right to examine the goods and reject them if they are not in conformity with the contract still remains unimpaired. I certainly cannot infer that, where the parties have dealt on c. i. f. terms, the buyer is not afforded a reasonable opportunity of examining the goods, though he may be bound to pay the price against tender of the documents and have no opportunity of seeing the goods until arrival at their destination. Nor does the fact that the buyer cannot see the goods until their arrival make the contract inconsistent with the provisions of s. 28 of the Sale of Goods Act, 1893, which provides that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods." Either the letters c. i. f. in these contracts constitute an agreement "otherwise" within the section, or possession must be deemed to have been given under the contracts when the hops have been put on board and the documents, which represent them and include the bill of lading, have been tendered to the buyers. The subsequent clauses in the contracts do not affect the above construction of the

(1) 10 Com. Cas. 42.

1910

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

contract or convert it into a contract to pay only on arrival and inspection.

Judgment for defendants.

Solicitors for plaintiffs: *Nicholson, Graham & Jones.*
Solicitors for defendants: *Parker, Garrett & Co.*

W. F. B.

1910
Nov. 2.

GILLOW AND OTHERS *v.* THE COUNTY COUNCIL OF DURHAM AND OTHERS.

Education — Non-provided School — Duty to maintain and keep efficient — Appointment and Payment of Caretaker — Management of School — Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

The managers of a non-provided public elementary school, in the discharge of the duties of management conferred upon them by s. 7, sub-s. 7, of the Education Act, 1902, are entitled, without interference from the local education authority, to cause the school to be properly cleaned and attended to, and the local education authority are bound to pay to the managers the reasonable expenses incurred by them of cleaning and attending to the school.

TRIAL of action before Hamilton J. without a jury.

The plaintiffs were the foundation managers, appointed under s. 11 of the Education Act, 1902, of the Roman Catholic public elementary school known as St. Patrick's Roman Catholic school at Consett, in the county of Durham. (1) The defendants the county council of Durham were the local education authority for the county, and the two other defendants were the managers of the school appointed respectively by the county council and the Consett Urban District Council.

The school was a non-provided school within the meaning of the Education Act, 1902. Since the year 1870 it had been carried on as a public elementary school and was recognized as such by the Board of Education, and since the coming into operation of the Education Act, 1902, it had been recognized

(1) The trustees in whom the freehold of the school was vested were also joined as plaintiffs for the purpose of founding a claim for damages for trespass, but this claim was not pressed.

1910

GILLOW v. DURHAM COUNTY COUNCIL.

by the defendant council as a public elementary school. The school was maintained and kept efficient by the defendant council under the Act. At the time when the Act of 1902 came into operation William McGuinness was the caretaker and Margaret Kane was the cleaner employed at the school. McGuinness was also employed as caretaker at St. Mary's Roman Catholic non-provided public elementary school at Blackhill, in the county of Durham. The employment of these two persons as caretaker and cleaner respectively was continued after the Education Act of 1902 came into operation, and their salaries were paid by the defendant council. On November 10, 1904, certain provisional regulations for the guidance of district sub-committees, managers, &c., which were made by the Durham County Education Committee, were approved by the defendant council, regulation 22 providing that one of the duties of a district sub-committee was "to appoint caretakers for the schools within the district at such scale or salary as may be sanctioned by the county education committee."

In 1905 the duties of school cleaners and caretakers were set out in a document issued by the Durham County Education Committee and were indorsed upon the forms of application by candidates for appointment as caretaker. These duties consisted in sweeping and scouring the rooms, lavatories, and passages in the school and the doors and approaches thereto; dusting the desks, seats, and other furniture, and removing ink stains from the desks and furniture; flushing and cleaning the water closets and urinals daily; keeping the playgrounds free from any accumulation of dirt; cleaning the eaves, gutters, rainwater pipes, &c., occasionally to prevent them from becoming choked; lighting fires in the rooms and attending to the lighting throughout the school; keeping the pictures, maps, plans, and charts free from dust, and cleaning inkstands and cupboards when required; and opening the school door before school hours.

In the early part of 1909 the position of cleaner at St. Mary's Roman Catholic school at Blackhill became vacant, and the defendant council, acting by their education committee, claimed the right to appoint to the vacancy, upon the ground that they had the right to appoint and dismiss caretakers and cleaners in

1910

GILLOW v. DURHAM COUNTY COUNCIL.

non-provided public elementary schools in accordance with regulation 22 of the provisional regulations. In pursuance of that claim, on April 21, 1909, they gave notice to McGuinness terminating his engagement as caretaker at the Consett and Blackhill Roman Catholic schools on May 31, and they also gave notice to Kane terminating her engagement as cleaner at the Consett Roman Catholic school on May 31. On May 31, 1909, the Consett district education sub-committee appointed Kane to be caretaker and cleaner of the Consett Roman Catholic school, and McGuinness to be caretaker and cleaner of the Blackhill Roman Catholic school. The plaintiffs disputed the above claim of the defendant council to have the right of appointing and removing caretakers and cleaners of non-provided schools, and brought this action claiming:

(1.) A declaration that the managers of St. Patrick's non-provided Roman Catholic public elementary school at Consett were entitled to appoint a caretaker and cleaner of the school.

(2.) A declaration that the managers were entitled to have such caretaker and cleaner maintained and paid by the defendant council.

(3.) A declaration that the regulations made by the defendant council for the appointment by them of caretakers and cleaners of the said school were ultra vires and void in law. (1)

C. A. Russell, K.C., and *V. S. Browne*, for the plaintiffs. Before the Education Act, 1902, school boards had no control over the instruction given in voluntary schools, now called non-provided schools, the managers having the entire control and management of the schools and having power under s. 99 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), to fulfil the conditions necessary to obtain the parliamentary grant. Sect. 5 of the Education Act, 1902, now gives the local education authority control of all secular instruction in public elementary schools not provided by them. Sect. 6 provides for the appointment of managers in provided and non-provided public elementary

(1) The two managers, who were not foundation managers, were made defendants because they did not agree with the claim put forward by the plaintiffs.

schools. Sect. 7, sub-s. 1, provides that "the local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which under this Act provision is to be made by the managers," but in the case of a non-provided school only so long as certain conditions and provisions are complied with. Those are the conditions and provisions upon the fulfilment of which the local education authority become liable to maintain and keep efficient the school. By s. 7, sub-s. 7, "the managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers." Sect. 11, sub-s. 6, makes the managers of a public elementary non-provided school the managers of that school for the purposes of the Elementary Education Acts, 1870 to 1900, and the Act of 1902. Sched. I., B, par. 4, provides that "the body of managers of a school provided by the local education authority shall deal with such matters relating to the management of the school, and subject to such conditions and restrictions, as the local education authority determine." There is no similar provision in the case of non-provided schools. The result is that, while the local education authority are bound to maintain and keep efficient all public elementary schools, both provided and non-provided, the whole powers of management, in the case of non-provided public elementary schools, except where the Act of 1902 has restricted those powers, are in the managers. The term "management" must include the duty of carrying out all such work as is necessary and proper for the purpose of keeping the school in a condition fit to be used as a school. The managers are responsible for the cleanliness of the school buildings. The Act of 1902 has not restricted their powers in this respect. In other respects, such as teaching, it has restricted their powers. The duties of a caretaker and cleaner as formulated in the document issued by the defendant council's education committee, which may be taken as accurately expressing those

1910

GILLOW v. DURHAM COUNTY COUNCIL.

duties, are duties of a domestic character and come within the term management. The duty to maintain and keep efficient the school does not carry with it the power of management. No doubt, if the school were kept in a dirty state or not properly warmed and lighted, the inspector of the Board of Education would report upon it adversely, and it would cease to earn the annual parliamentary grant, and might cease to be a school which the local education authority were bound to maintain. With regard to all questions of management it is left to the self-interest of the managers to carry out their duties properly, and the Act does not provide for any interference with them in this respect by the local education authority. In the Elementary Education Act, 1870, the "control and management" (in s. 14) of a school provided by a school board is distinguished from the duty to "maintain and keep efficient" the school (in s. 18). The power to manage the school includes therefore the right to appoint a caretaker and cleaner. The plaintiffs accordingly are entitled to the first declaration claimed.

Next, if a school is to be maintained and kept efficient it must be properly cleaned, warmed, and lighted. The duty to maintain and keep efficient the school is cast upon the local education authority, together with the control of all expenditure required for that purpose. Therefore the local education authority must provide funds to meet the reasonable expense of a caretaker and cleaner, whose duty it is to clean, warm, and light the school. The local education authority have a right to fix the sum, subject to an appeal to the Board of Education if the managers think the sum too small. The plaintiffs therefore are entitled to the second declaration claimed.

The third declaration claimed is unimportant, as it follows from the first declaration claimed.

Tindal Atkinson, K.C., and *Simey*, for the defendants. Sects. 15 and 16 of the Elementary Education Act, 1870 (which are now repealed), permitted a school board to delegate to managers the control and management of schools provided by them, and s. 18 imposed the duty upon the school board of maintaining and keeping efficient every such school. The

school board clearly had the power under the words "maintain and keep efficient" in s. 18 to appoint caretakers and cleaners of such schools. Before the Education Act, 1902, voluntary schools were not subject in any way to the school board. They were under the entire control and management of their own managers, who could employ and pay any person they pleased. The whole of that machinery has gone. The old managers have been abolished, and new managers have been established under s. 6, sub-s. 2, of the Act of 1902; and s. 7, sub-s. 1, has imposed upon the local education authority the duty to "maintain and keep efficient" all public elementary schools, including non-provided, that is, the old voluntary, schools. The words "maintain and keep efficient" ought to be read in the same sense as in s. 18 of the Act of 1870, and therefore as including the appointment and dismissal of caretakers and cleaners. A dirty school is not kept efficient. By s. 7, sub-s. 4, one of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant is that the school is maintained under and complies with the provisions of that section. By the Code the school must be clean and properly warmed and lighted in order to earn the annual parliamentary grant, which is only given if the school is efficient. Therefore the cleaning, warming, and lighting of the school form part of the duties of the authority which has to "maintain and keep efficient" the school. The words "keep efficient" mean that the school is to be in a position to earn the parliamentary grant: *Attorney-General* v. *West Riding County Council.*(1) The powers of management given to the managers by s. 7, sub-s. 7, of the Act of 1902 are subject to the powers of the local education authority under that section. Except where the managers of a non-provided school are given express powers by the Act they are merely the ministers of the local education authority to see that the scheme of education and the requirements of the Act are carried out. The managers are a new statutory body, and their power, if any, to appoint caretakers must be found in the Act creating the body. No such power is to be found, but it is given to the local education authority under the obligation to

(1) [1907] A. C. 29, at pp. 35, 40.

1910

GILLOW v. DURHAM COUNTY COUNCIL.

keep the school efficient. If there is any doubt whether the appointment of a caretaker comes within the words "maintain and keep efficient" or within the word "management," that doubt is resolved by the fact that the local education authority have to pay the caretaker. He is their servant. Unless the caretaker is part of the machinery for keeping the school efficient, the managers cannot call upon the local education authority to pay for him. The obligation to keep the school efficient and the control necessary to carry out that obligation ought to go together. The obligation to "keep efficient" includes keeping the school premises in a proper condition as regards health and comfort, and all that is involved in saying that they shall be so kept as to be a proper place for the reception of children: per Lord Halsbury in *Ching* v. *Surrey County Council* (1); and Farwell L.J. in *Morris* v. *Carnarvon County Council* (2) said that it is settled that the duty to maintain the school imposed upon the local education authority by the Education Act, 1902, is not confined to the maintenance of the school as an educational institution, but extends to keeping the school and premises belonging thereto in a proper condition. Part, at any rate, of the duties of a caretaker is connected with keeping the school efficient, and it is the duty of the defendant council, who have the control of all expenditure required for that purpose, to employ and pay a person to do that work. If incidentally the caretaker also does certain work which it is the duty of the managers to provide for, the managers have no cause of complaint because that work is done for them without payment. Where the Act intends to give to the managers of a non-provided school exclusive power to appoint and dismiss officials, it gives that power in express terms, as in the case of teachers (s. 7, sub-s. 7). There is no such power given in the case of caretakers.

C. A. Russell, K.C., in reply. The cases of *Ching* v. *Surrey County Council* (3) and *Morris* v. *Carnarvon County Council* (4) are of no assistance in this case, because there the schools were schools provided by the local education authority, and the

(1) [1910] 1 K. B. 736, at p. 742.
(2) [1910] 1 K. B. 840, at p. 844.
(3) [1910] 1 K. B. 736.
(4) [1910] 1 K. B. 840.

language used is applicable to those schools only. [*Crocker* v. *Plymouth Corporation* (1) was also referred to.]

1910

GILLOW v. DURHAM COUNTY COUNCIL.

HAMILTON J. This action is brought by the majority of the managers of St. Patrick's Roman Catholic school at Consett, in the county of Durham, against the county council of Durham, as the local education authority, and two of the managers, who dissent from the course taken by the majority, and who are therefore made defendants in the action.

The facts are not in controversy. The question arises upon s. 7 of the Education Act, 1902, and it is undoubtedly of greater intrinsic importance than would at first sight appear. It has reference to the appointment of persons called caretakers and cleaners of non-provided public elementary schools, whose duties appear to be multifarious. A document drawn up by the education committee of the local education authority sets out in detail the various duties of such persons, duties as to the care of the property of the trustees of the school, the discharge of which would save expense to the managers in repairs to the school buildings, duties to the local education authority in respect of the furniture and school apparatus, duties necessary to be performed by some one in places where children are brought together for the orderly conduct of an educational establishment; but in my view the detailed statement of those duties does not advance the matter any further than the description of the persons as caretakers and cleaners. It does not seem to me to be correct to assume, as the parties have assumed, that there ought to be a person officially appointed as caretaker or cleaner, and although it is no doubt convenient that one person should do the cleaning and caretaking continuously in one place, there is nothing in the nature of the duties which involves the appointment of some one person as caretaker or cleaner, or which forbids the employment of a person to do the work as and when required. If the employment is to be treated as an appointment, the matter becomes of some practical importance, because it involves the exercise of patronage, and because it is desirable that those who are so employed at schools where children are

(1) [1906] 1 K. B. 494.

1910

GILLOW v. DURHAM COUNTY COUNCIL.

Hamilton J.

taught should have good characters, but still the ordinary duties of a caretaker and cleaner are to clean the school generally, to lay and light the fires, to see that they are kept alight, and otherwise to do simple household duties about the school.

The question which I have to decide depends principally upon s. 7 of the Education Act, 1902. It is said on behalf of the defendant council that they, as the local education authority, are bound by the Act to maintain and keep efficient this school so long as it is a public elementary school and complies with the conditions and provisions stated in the section; that they are prepared to discharge this duty and have done so; that they have by statute the control of all expenditure required for that purpose other than the expenditure which has to be provided by the managers, which is not material here; that it is therefore part of their statutory duty, in maintaining this school and keeping it efficient, to see that it is properly lighted, warmed, and cleaned; and that hence they have the right to engage the persons, whether permanent appointees or not, to perform those duties, and to agree with them as to the wages to be paid. On the other hand it is said on behalf of the plaintiffs that, though they may not be in the eye of the law the same managers of the school as were in existence before the Education Act, 1902, came into operation, they are the managers of the school within s. 7, sub-s. 7, of the Act, and that under that sub-section there are conferred upon them all powers of management required for the purpose of carrying out the Act; that in the course of managing the school they have to light, warm, and clean it, to open and close the doors at the proper times, quite independently of any question as to who is to pay for the coals or the gas or the implements used; and that therefore the powers of management conferred upon them by the Act must extend to and cover the causing the school to be cleaned and attended to by some person who discharges the duties of caretaker and cleaner.

The first thing to be borne in mind is that the duties of a caretaker and cleaner at a school are strictly of an executive character; they involve no question of policy, no question of popular control of secular education, no question as to the standard of instruction; they resemble household duties requiring

diligence and local management. The second is that the scheme of the Act undoubtedly draws a distinction between schools which are provided by the local education authority and schools which are not so provided. In the case of non-provided schools it is optional whether those who are interested in those schools will bring themselves within the provisions of the Act or not, in this sense, that if they choose to carry on a school which does not qualify to earn the parliamentary grant they are at liberty to do so at their own expense. Upon the other hand, as a condition of making their school a public elementary school and thereupon claiming the benefit of s. 7, sub-s. 1, they must conform to the conditions laid down in that section, and they must submit to that amount of control which the Act, in consideration of that support, has given to the local education authority. I do not think that it is necessary for the purpose of determining this case to decide which, if either, of the two extreme views put before me is correct, namely, whether the defendants are right in saying that except in so far as specific powers are given to the managers of a non-provided school they are the mere ministers of the local education authority, or whether the plaintiffs are right in saying that except in so far as the Legislature has given the local education authority powers of interference the latter are the mere paymasters of an enterprise carried on by others. When one bears in mind the nature of the duties, the scheme of the Act, and the necessity of reconciling sub-s. 1 with sub-s. 7 of s. 7, and also of referring to the Elementary Education Act, 1870, to ascertain what the duties of the local education authority are, the solution of the present problem can be found. It may be that under the Act of 1870 such duties as the caretaker and cleaner has to perform would come either within the words "maintain and keep efficient" in s. 18, or within the words "control and management" in s. 14, though personally I should have thought that the duties would fall within "control and management" rather than within "maintain and keep efficient," but under the Act of 1902 the duty to maintain and keep efficient a non-provided school must be construed consistently with and not, if possible, so as to override the rights of the managers to have in

1910

GILLOW v. DURHAM COUNTY COUNCIL.

Hamilton J.

their hands all powers of management required for the purpose of carrying out the Act. It is to be observed that sub-s. 7 itself places in opposition to one another the expressions "maintained" and "management." The non-provided school is one which is maintained and kept efficient by persons who have not provided it, and in respect of it the managers are to have all powers of management required for the purpose of carrying out the Act—a provision which, it cannot be disputed, would of itself include the power of cleaning, lighting, and warming the school. It follows that the managers of a non-provided school, who elect to bring themselves within s. 7 and to perform its conditions, still retain the powers of management required for the purpose of making the school a place of public elementary education, and, subject to the conditions of that section, the local education authority's obligation to maintain and keep efficient that public elementary school does not override the powers of management bestowed upon the managers. This conclusion is fortified by bearing in mind that by s. 5 of the Act of 1902 the duties of the local education authority are defined by reference to, among other Acts, the Elementary Education Act, 1870; that under the Act of 1870, where no question of non-provided schools arose, the then education authority, the school board, had two classes of duties, first, that of control and management, and, second, that of maintaining and keeping efficient; and therefore when I find that the same language is employed in the Act of 1902 I must infer that the provision as to maintaining and keeping efficient the school was not intended to overlap the provision as to management.

I have come to the conclusion, therefore, that the managers are the persons who have the power and the duty, I prefer not to say of appointing the caretaker and cleaner, but of causing the school to be properly cleaned and attended to; and I do not find that there is anything in the Act which cuts down that power by giving a co-equal power to the local education authority to cause that executive and purely local act to be performed. The fact that the Act is intended to deal with schools in which two classes of persons are jointly concerned in effecting the common object of public elementary education ought, it seems to me, to make

one slow to place an interpretation upon the Act which might lead to friction; and if the power of causing the school to be cleaned rests with the managers, friction will undoubtedly be caused if the power of sending somebody else into the same school to perform the same duties rests co-ordinately with the local education authority. The plaintiffs therefore succeed upon their first claim, though I think that it would be better to make a declaration that they are entitled to cause the school to be duly cleaned and attended to, and that the local education authority are not entitled to interfere with their management in that respect.

There remains the further question whether the managers are entitled to call upon the local education authority to pay the expense caused by the exercise of that power. The Act 1902 does not deal with this matter in express terms. In the case of the teachers s. 7, sub-s. 7, expressly enacts that the managers shall have the exclusive power of appointing and dismissing them. That express provision, which, as was decided in *Crocker* v. *Plymouth Corporation* (1), shews that the contract of employment is with the managers and not with the local education authority, ought, it is said, to be taken to exclude any implication of any other exclusive power of appointment in the managers at all, and so, if the managers choose to employ some one as caretaker and cleaner, they ought to pay his wages themselves, there being no provision in the Act which obliges the local education authority, who are willing to provide and pay a person to do the work, to pay for its being done by some one whom the managers insist upon providing themselves.

It seems to me that the argument arising from the express enactment of an exclusive power is met by remembering, as I have already had occasion to point out when dealing with the first question, that in the same sub-section there is an express grant to the managers of all powers of management required for the purpose of carrying out the Act, and I think it essential that there should be an exclusive management in such a matter, because it would be disastrous that in carrying out duties of this kind there should be two bodies concerned either in the appointment or in the direction of the person employed

(1) [1906] 1 K. B. 494.

1910

GILLOW v. DURHAM COUNTY COUNCIL.

Hamilton J.

to perform them. It cannot be denied that if a school is to be properly maintained and kept efficient, it must be lighted, warmed, and cleaned, and as it is expressly provided by the Act, which, as I hold, gives to the managers the power of having the school cleaned in order to procure efficiency, that the local education authority shall keep efficient public elementary schools and have the control of the expenditure required for that purpose, the local education authority must provide the money necessary to keep efficient the public elementary school in this respect, and they have the control of it because they have the right of controlling the outlay and seeing that it is properly applied. This being so, the plaintiffs are entitled to the second declaration claimed, namely, that they are entitled to have the reasonable expenses of cleaning the school and duly attending to it paid by the local education authority as part of the expenditure necessary for the maintenance and efficiency of the school.

The next claim by the plaintiffs is really unimportant. In certain "provisional regulations for the guidance of district sub-committees," approved as long ago as 1904, the local education authority provided, inter alia, that among the duties of those district sub-committees was the duty "to appoint caretakers for the schools within the district at such scale or salary as may be sanctioned by the county education committee." If one reads the words "the schools within the district" as including all the schools, then, if my judgment is right, that proposition is too wide; but if one reads those words as applying only to the schools as to which the local education authority can make such a regulation, namely, the provided schools, it seems to me to be inoffensive. I do not think, therefore, that any separate declaration is required upon this head, and I do not propose to make one.

There will therefore be judgment for the plaintiffs for such declarations as I have indicated.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Ridsdale & Son, for Watts & Carr, Liverpool.*

Solicitors for defendants: *Maude & Tunnicliffe, for R. Simey, Durham.*

W. F. B.

LONDON COUNTY COUNCIL, Appellants *v.* CANNON BREWERY COMPANY, LIMITED, Respondents.

1910
Oct. 13;
Nov. 11.

Metropolis—Building—Means of Escape in Case of Fire—"Dwelling-house occupied as such by not more than two families" — Public-house — Employees living in House—London Building Acts Amendment Act, 1905 (5 *Edw.* 7, *c. ccix.*), *s.* 12.

By s. 12, sub-s. 1, of the London Building Acts Amendment Act, 1905, every existing building to which s. 10 applies, "and every other existing building except a dwelling-house occupied as such by not more than two families," shall, if having more than two storeys above the ground storey, be provided with certain specified means of access to the roof. Sect. 24, sub-s. 1 (*e*), renders a person liable to a penalty who fails to comply with the provisions of s. 12.

A fully-licensed public-house contained four storeys above the basement. The ground floor was used almost entirely as a bar. There were two sitting rooms on the first floor and six bedrooms on the two upper floors. The house was inhabited by thirteen persons, namely, the tenant, his wife and three children, their servant, and the members of the public-house staff, all of whom slept there. Upon an information for non-compliance with the provisions of s. 12 the magistrate was of opinion that the house was a dwelling-house and that it was occupied as such by one family only, and that therefore s. 12 did not apply:—

Held, that upon the facts the magistrate was justified in finding that the house was a dwelling-house occupied as such by one family, and was therefore within the exemption in s. 12, it being impossible to draw a distinction between the tenant's servant and the members of the public-house staff and to say that the latter were not equally members of the same family as the former.

Case stated by a metropolitan police magistrate.

An information was laid on behalf of the appellants charging that the respondents, on August 18, 1909, being the owners of a building known as 120, Euston Road, in the county of London, which was a building having more than two storeys above the ground storey and exceeding thirty feet in height (not being a dwelling-house occupied as such by not more than two families), did unlawfully fail to comply with the provisions of s. 12 of the London Building Acts Amendment Act, 1905, whereby they became liable to the penalties prescribed by s. 24, sub-s. 1 (*c*), of the Act for not providing means of access

1910

LONDON COUNTY COUNCIL v. CANNON BREWERY COMPANY, LIMITED.

to the roof specified in s. 12 for the purpose of escape from fire. (1)

At the hearing the following facts were proved or admitted:—

"(*a*) The respondents are the owners of the house No. 120, Euston Road, which is used as a public-house and is known as the Rising Sun. The said house is described in the rate-book as being in Euston Road.

"(*b*) The said house stands at the corner of Euston Road and Chalton Street, being on the north side of Euston Road and on the west side of Chalton Street. The main building has four storeys over the basement, but the ground floor projects as a ground floor building for a distance of forty-nine feet beyond the south front or wall of the main building right out to the pavement of Euston Road. The basement contains a kitchen, cellars, and a pot-house. The whole of the ground floor, except a small office in the centre, is used as a bar. The first floor is divided into two sitting rooms, a spirit store, a lavatory, and a passage. There are two bedrooms and a lavatory on the second floor, and four bedrooms on the third floor. The total length of frontage on Chalton Street is eighty-six feet, of which the frontage of the house as distinct from the projection

(1) 5 Edw. 7, c. ccix., s. 10, sub-s. 1: "Where any part of a building which is used or adapted to be used as a shop projects for a distance of seven feet or more beyond the main front of any building of which it forms part, and in which any persons are employed or sleep, the projecting portion of such shop shall be provided by the owner with a roof constructed of fire-resisting materials not less than five inches thick." The marginal note to this section is "Projecting shops."

Sect. 12, sub-s. 1: "(A) Every existing building to which the section of this Act, whereof the marginal note is 'Projecting shops,' applies, and every other existing building except a dwelling-house occupied as such by not more than two families; and

(B) Every new building;

shall if having more than two storeys above the ground storey or if exceeding thirty feet in height be provided (unless and except so far as the council (London County Council) otherwise allow) by the owner with" proper means of access to the roof.

By sub-s. 3, the section is not to apply to any building falling within either s. 7 or s. 9 of the Act. The marginal note to this section is "Means of access to roofs."

Sect. 24, sub-s. 1 (*e*), renders a person who fails to comply with the respective provisions of s. 10 and s. 12 liable to a penalty.

is thirty-seven feet, and the length of frontage on Euston Road is twenty-one feet.

"(*c*) Chalton Street is a street leading out of Euston Road.

(*d*) The house is inhabited by thirteen persons, namely, the tenant, his wife, his three children, their servant, and the members of the public-house staff. All the said persons sleep in the house.

"(*e*) There is one entrance to the said house in Euston Road, another at the corner between Euston Road and Chalton Street, and two more in Chalton Street. There is also a private entrance in Chalton Street leading to the bar on the ground floor and by a passage and staircase to the first, second, and third floors, and this is the shortest way to the open street from the bedrooms and main building, and is the natural method of access to and from that part of the house. The said passage is enclosed in and the said staircase is built of fire-resisting material.

"(*f*) The said house was rebuilt in the year 1899 and was an 'existing building' within the meaning of the said Act. The said built-out portion of the ground floor is used for the sale of liquors and other purposes of an ordinary public-house bar.

"(*g*) The said building was not provided with the means of access to the roof specified or referred to in section 12 of the said Act, and it was admitted that it would be a matter of great difficulty to provide safe or suitable access to the roof and shelter thereon owing to its formation."

The appellants contended that the house was a building within s. 12 of the Act. The respondents contended that the house was not within s. 12, because it was not within s. 10 and was a dwelling-house occupied as such by not more than two families.

The magistrate was of opinion that the main front of the house was in Chalton Street, and that the main front was not necessarily that side of a corner house which fronted the main or principal street for the purposes of the Act, and that therefore the ground floor projection towards Euston Road was not a projection within the mischief of s. 10. He was also of opinion

1910

LONDON COUNTY COUNCIL v. CANNON BREWERY COMPANY, LIMITED.

that the house was a dwelling-house, and that the thirteen persons above referred to were one family (1) within the meaning of s. 12, so that the building was not within s. 12 at all. He therefore dismissed the information.

The question for the opinion of the Court was whether upon the facts above stated the magistrate was right in law in holding that the house was not a building within ss. 10 or 12 of the London Building Acts Amendment Act, 1905.

Macmorran, K.C. (*F. F. Daldy* with him), for the appellants. This case comes within s. 10 of the London Building Acts Amendment Act, 1905. A building may have more than one main front. This building is known as 120, Euston Road, and fronts upon two streets. The main front or one of the main fronts is in Euston Road, and there is a projection extending more than seven feet from the main front. "Main front" refers to the wall of the main building as distinguished from the wall of the projection.

Secondly, s. 12 of the Act applies to this case. This is an "existing building," and it does not come within the exception of a "dwelling-house occupied as such by not more than two families." By s. 6, sub-s. 2, words and expressions used in the Act shall, unless otherwise stated or the

(1) In the shorthand note of his judgment, which was annexed to and made part of the case, the magistrate stated that the house was a "dwelling-house" within the definition given in s. 5, sub-s. 25, of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) (which is applied to the London Building Acts Amendment Act, 1905, by s. 6, sub-s. 2, of the latter Act); and further, though reliance was placed upon the fact that there were living in the house representatives of many families, namely, barmaids, barmen, and other persons up to the number of thirteen, still it seemed to him that the meaning of "family" was that there was one menage, one management, and common meals. Here the arrangements consisted of one cuisine and one common head arranging for the whole of those persons living there; and in his opinion they need not necessarily be related to be one family within the meaning of the section, and however many individuals there were, they might constitute one family although they were not related by blood. Therefore he held that there were certainly not more than two families, and in his opinion there was only one family, in this house.

context otherwise requires, have the meanings assigned to them by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.); and by s. 5, sub-s. 25, of this latter Act, "the expression 'dwelling-house' means a building used or constructed or adapted to be used wholly or principally for human habitation." The trade of a licensed victualler is carried on upon the whole of the premises: *Carritt* v. *Godson* (1), a decision which was approved in *Dicksee* v. *Hoskins*. (2) By the exception in s. 12 of the Act of 1905 the dwelling-house must be occupied "as such," that is, it must be used or constructed or adapted to be used wholly or principally for human habitation. It is impossible to say that this house is a dwelling-house occupied principally for human habitation. It is occupied principally for the purpose of the trade carried on there. A public-house, therefore, is not a "dwelling-house" within the meaning of s. 12. Even if the house can be said to be a dwelling-house, it was not a dwelling-house occupied as such by not more than two families. The word "family" means a domestic family, and would include ordinary domestic servants, but it does not include employees living in a house for the purposes of the trade which is carried on there. The inhabitants of a workhouse have been held to be members of one family: *Liskeard Union* v. *Liskeard Waterworks Co.* (3); but a trade is not carried on in a workhouse, and the inhabitants may well be called members of one family. Moreover, the Act there under discussion was different from that now before the Court, the question being whether the supply of water to the workhouse was a supply for domestic purposes. If persons living in the house for the purposes of the trade which is carried on there are held to be one family, as, for instance, assistants in large shops who live in, s. 9 of the Act will be rendered almost useless. The house here was occupied by more than two families. The magistrate was therefore wrong.

Danckwerts, K.C. (*Ryde* with him), for the respondents, was not called upon to argue the first point. With regard to the second point, namely, that arising under s. 12 of the Act of 1905, inasmuch as the definition of "dwelling-house" in s. 5, sub-s. 25,

(1) [1899] 2 Q. B. 193. (2) [1901] 2 K. B. 122, 660.
(3) (1881) 7 Q. B. D. 505.

1910

LONDON COUNTY COUNCIL v. CANNON BREWERY COMPANY, LIMITED.

of the London Building Act, 1894, is incorporated in the Act of 1905, the word "dwelling-house" in s. 12 means a building used or constructed or adapted to be used wholly or principally for human habitation. "Habitation" does not necessarily include sleeping. The definition of the word "inhabited" in s. 5, sub-s. 37, of the Act of 1894 shews this. A house may be inhabited in the daytime only. A licensed house is an inhabited dwelling-house within the House Tax Act, 1851 (14 & 15 Vict. c. 36). The business of an ordinary public-house is carried on in a dwelling-house: *Carritt* v. *Godson*. (1) The licensee necessarily has to reside there, and the business is therefore carried on in a dwelling-house. A public-house is therefore a house used wholly or principally for human habitation, or at any rate it is adapted to be so used, and is a "dwelling-house" within s. 12.

Next, with regard to the question whether the dwelling-house is occupied by more than two families, the word "family" in s. 9 may be used in a narrower sense than in s. 12. Sub-s. 3 of s. 12 excludes from the operation of that section any building falling within ss. 7 or 9. The word "family" in s. 12 means a family in the ordinary sense of the word, as including the occupier, his wife and children, and his servants. A barman in a licensed house is part of the occupier's family within s. 12. A large shop where assistants sleep comes within s. 9 and not within s. 12. Shop assistants do not live as one family, whereas a barman, who has to sleep in the house for the purposes of the business, lives there as one of the occupier's family. The magistrate was therefore right.

Macmorran, K.C., in reply. It may be that a public-house is a dwelling-house within the House Tax Act, 1851, for the purposes of taxation, but it does not follow that it is a dwelling-house for other purposes. A dwelling-house is a house which is used for the purpose of residence, and not for the purpose of carrying on a trade. A public-house is not principally used for the purpose of residence. It is therefore not a dwelling-house. That is not a question of fact, but a question of law. No public-house is a "dwelling-house" within s. 12,

(1) [1899] 2 Q. B. 193.

though persons may live in it. The licence extends to the whole house, and the trade is carried on throughout it.

Cur. adv. vult.

Nov. 11. The judgment of the COURT (Lord Alverstone C.J., Pickford and Lord Coleridge JJ.), which was written by Lord Coleridge J., was read by

PICKFORD J. This is an appeal on a case stated by the police magistrate of the Clerkenwell police court. A charge against the respondents, who were the owners of 120, Euston Road, for not complying with the provisions of s. 12 of the London Building Acts Amendment Act, 1905, was dismissed by the magistrate.

The following are the main facts as set out in the case stated by him. [His Lordship read paragraphs (*a*) to (*g*) inclusive as given above, and continued:—] The section under which the charge was made provides that "(1.) (A) Every existing building to which the section of this Act, whereof the marginal note is 'Projecting shops,' applies, and every other existing building except a dwelling-house occupied as such by not more than two families . . . . shall, if having more than two storeys above the ground storey, or if exceeding thirty feet in height, be provided" with certain specified appliances for giving means of access to the roof. Sect. 10, the marginal note of which is "Projecting shops," provides that "(1.) Where any part of a building which is used or adapted to be used as a shop projects for a distance of seven feet or more beyond the main front of any building of which it forms part, and in which any persons are employed or sleep, the projecting portion of such shop shall be provided by the owner with a roof constructed of fire-resisting materials not less than five inches thick." Sect. 24, sub-s. 1 (*e*), provides penalties for non-compliance with those sections. By s. 5, sub-s. 25, of the London Building Act, 1894, which by s. 6, sub-s. 2, of the Act of 1905 applies to this case, the expression "dwelling-house" means a building "used or constructed or adapted to be used wholly or principally for human habitation."

1910

LONDON COUNTY COUNCIL v. CANNON BREWERY COMPANY, LIMITED.

It is clear that the house and additional building is a "shop" within the meaning of the Act: *Formby* v. *Barker* (1)—a view which is confirmed by the Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 8, sub-s. 3, where "shop" for the purposes of the Act includes "any premises or place where retail trade is carried on." But inasmuch as the main front of the building has been found by the magistrate to be in Chalton Street, upon evidence which we think justified him in so finding, and no part of it projects beyond the main front in Chalton Street, it does not come within the provisions of s. 10, sub-s. 1. Does it then come within the description in s. 12, "Every other existing building except a dwelling-house occupied as such by not more than two families"? Are these premises such a "dwelling-house"? It was contended by the appellants that, as the premises were used for the business of a public-house, they could not be a dwelling-house; and by the respondents that a fully-licensed public-house must in substantially all cases be a dwelling-house, because the licensee necessarily lives there and would naturally live there with his family. We do not think that we can lay down either of these propositions as a general rule applicable to all cases. It must therefore be a question of fact in each case, and in this case the magistrate has found that these premises are a dwelling-house, and we think that there was evidence on which he could so find. No difficulty would arise except for the additional words "occupied as such by not more than two families." A "family" for this purpose would clearly include servants. Here there was no sub-division inside into separate houses, as in *Weatheritt* v. *Cantlay* (2); no separate letting, as in *Kyffin* v. *Simmons*. (3) There was but one establishment, not separate establishments. The question what is one "family" is largely a question of fact. It is impossible to distinguish between the servant and the members of the public-house staff and to say that the latter were not equally members of the same "family" as the former.

The conclusion to which we come, therefore, is that this house was "a dwelling-house occupied as such by not more than two families," and that therefore the exemption in s. 12, sub-s. 1,

(1) [1903] 2 Ch. 539. (2) [1901] 2 K. B. 285.
(3) (1903) 67 J. P. 227.

applies to it. Our judgment must therefore be for the respondents.

1910

LONDON COUNTY COUNCIL v. CANNON BREWERY COMPANY LIMITED

Appeal dismissed.

Solicitor for appellants: *E. Tanner.*
Solicitors for respondents: *Boulton, Sons & Sandeman.*

W. F. B.

LA SOCIÉTÉ ANONYME DE REMORQUAGE À HÉLICE *v.* BENNETTS.

1910
Nov. 7, 8.

Negligence—Cause of Action—Injuria sine damno—Contract of Towage—Tow sunk by Negligence of Third Party—Loss to Tug Owner of Towage Remuneration.

A steam tug belonging to the plaintiffs was engaged under a towage contract in towing a ship when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision with and sank the tow. No damage was caused to the tug or her equipment by the collision.

In an action brought by the plaintiffs to recover from the defendant as damages the amount of towage remuneration which they would have earned if they had completed the towage contract:—

Held, that the plaintiffs had no cause of action, for, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

Cattle v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453, followed.

ACTION tried in the Commercial Court before Hamilton J. without a jury.

The plaintiffs claimed to recover damages suffered by them by reason of the negligence of the defendant's servants. The facts, so far as material, were as follows.

On April 4, 1910, the steam tug *John Bull*, belonging to the plaintiffs, was engaged in towing the ship *Kate Thomas* from Antwerp to Port Talbot, South Wales, when the steamship *India*, belonging to the defendant, by the negligence of the defendant's servants, came into collision with and sank the *Kate Thomas*. The tug received no damage either to herself or her equipment. The plaintiffs alleged that by reason of the

1910

REMORQUAGE À HÉLICE (SOCIÉTÉ ANONYME DE) v. BENNETTS.

negligence of the defendant's servants they were deprived of their tow and lost the towage remuneration they would otherwise have received, and claimed 80*l.* as the amount of towage remuneration so lost, that being the remuneration fixed by the contract for the towage of the *Kate Thomas* from Antwerp to Port Talbot. At the time of the accident about four-fifths of the voyage from Antwerp to Port Talbot had been completed. The defendant contended that the plaintiffs had no cause of action in respect of the loss of the towage remuneration upon the ground that, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

It appeared from the report of the master of the *John Bull* that, seeing the *Kate Thomas* was in a most alarming sinking condition after the collision, he immediately cast off the hawser in order to be able to render assistance to the ship, but that before reaching the place of the disaster she had sunk. The defendant paid the plaintiffs for the loss of the hawser. Clause 9 of the towage contract provided as follows: "Sea towage interrupted by accident to be paid pro rata of distance towed."

Leck, for the plaintiffs. There was negligence on the part of the defendant's servants and damage flowing from it which constitute a cause of action. The damages for loss of the towage remuneration are not too remote. They are the direct result of the collision. The rule is laid down in Mayne on Damages, 8th ed., p. 54: "The first, and in fact the only inquiry, in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shewn to be such a consequence as, in the ordinary course of things, would flow from the act. . . . ." This passage is cited with approval in Carver on Carriage by Sea, 5th ed., s. 717, note (k), p. 942. The tug was at the time of the collision actually engaged in earning remuneration which it was stipulated she should receive for the towage, and can therefore recover the damages claimed: *The Betsey Caines*. (1) The loss of

(1) (1826) 2 Hagg. Adm. 28.

earnings of a vessel in an employment which has been contracted for at the time of the collision is recoverable: *The Argentino* (1); *The Kate.* (2) If the plaintiffs' tug had herself been sunk or damaged by the collision, it is clear from the above cases that the damage claimed would have been recoverable. The mere fact, however, that the tow was sunk by the collision does not make the damage claimed too remote. The loss is as direct a result of the collision in the one case as in the other. The tug and the tow are for some purposes to be regarded as one vessel. The decision in *Cattle* v. *Stockton Waterworks Co.* (3) is not against the plaintiffs' contention. In that case the loss was not one which in the ordinary and natural course of things flowed from the defendants' act. The defendants there allowed water to escape from one of their mains, and the water accumulated on certain land where the plaintiff was doing some work for the owner of the land and delayed the plaintiff in completing the work. It was held that he could not recover from the defendants for the loss so caused to him. That is a totally different case from the present. Actual impact is not necessary: *Dulieu* v. *White & Sons* (4), where *Victorian Railways Commissioners* v. *Coultas* (5) was not followed. While the tug was physically attached to the tow the defendant's vessel collided with and sank the tow. The defendant was under a duty towards the tug as well as towards the tow to navigate carefully, and is liable for the loss which is the natural consequence of his servants' act. [*Hobbs* v. *London and South Western Ry. Co.* (6) was also referred to.]

J. R. Dunlop, for the defendant. The defendant was guilty of no breach of duty towards the plaintiffs. It was the duty of the defendant's vessel to take reasonable care not to come into collision with the plaintiffs' tug. She did not touch the tug or the towing hawser. Negligence is not actionable unless it causes damage to the person or property of the plaintiff. The negligent act of the defendant's vessel only put an end to the performance of the contract between the plaintiffs and the owner of the tow,

(1) (1889) 14 App. Cas. 519.
(2) [1899] P. 165.
(3) L. R. 10 Q. B. 453.
(4) [1901] 2 K. B. 669.
(5) (1888) 13 App. Cas. 222.
(6) (1875) L. R. 10 Q. B. 111.

1910

REMORQUAGE À HÉLICE (SOCIÉTÉ ANONYMEDE) v. BENNETTS.

and that gives no cause of action to the plaintiffs: *Heaven* v. *Pender* (1); *Le Lievre* v. *Gould*. (2) The collision merely brought into operation an event upon the happening of which the parties had agreed that the contract of towage should be put an end to. That does not give rise to any cause of action against the defendant. Although there was a breach of duty followed by damage to the owner of the tow, there was only injuria sine damno so far as the tug was concerned. There are only two instances in which an interference with contractual rights by a third person gives rise to a cause of action: (1.) where the defendant knowingly induces a person to break his contract with the plaintiff; (2.) where a person is induced by the defendant by unlawful means not to enter into a contract with the plaintiff. *Cattle* v. *Stockton Waterworks Co.* (3) shews that, although one person by his negligence renders it more expensive for another to carry out his contract with a third person, there is no right of action against the negligent person. *Simpson* v. *Thomson* (4), *Anglo-Algerian Steamship Co., Ld.* v. *Houlder Line, Ld.* (5), and *The Marpessa* (6) are in the defendant's favour. The damage flowed directly from the terms of the towage agreement, which came to an end immediately the tow was sunk, not from the negligence of the defendant's servants. In any event the plaintiffs can only recover 16*l.*, as four-fifths of the towage had been completed when the towage was interrupted, and by the contract towage interrupted by accident was to be paid pro rata for the distance towed.

Leck in reply. Clause 9 of the towage contract means that pro rata freight is to be paid where a stage of the towage voyage has been completed but the further prosecution of the voyage is interrupted by an accident. The clause does not apply if the vessel is at sea but has not completed any stage of the towage voyage. *The Marpessa* (6) is no longer a binding authority as to what damages are recoverable, as it has been considered in *The Minnetonka*. (7) There is a distinction between a case

(1) (1883) 11 Q. B. D. 503.
(2) [1893] 1 Q. B. 491.
(3) L. R. 10 Q. B. 453.
(4) (1877) 3 App. Cas. 279.
(5) [1908] 1 K. B. 659.
(6) [1891] P. 403.
(7) [1905] P. 206.

where a bare contractual right is interfered with and a case where the contract is not only made but is being performed. It must be admitted that there is no right of action in the former case. But in the present case the tug was actually engaged in earning the towage remuneration at the time of the collision, and it is immaterial that the damage was inflicted upon the tow and not upon the plaintiffs' tug. There was equally a breach of duty to the plaintiffs on the part of the defendant.

HAMILTON J. This action is brought by the plaintiffs, La Société Anonyme de Remorquage à Hélice, against the defendant, J. H. Bennetts, the plaintiffs being the owners of the tug *John Bull* and the defendant the owner of the steamship *India*, to recover damages caused to the plaintiffs by reason of the *India* running down and sinking on April 4, 1910, the *Kate Thomas*, which the *John Bull* was towing from Antwerp to a port in South Wales. The damage claimed is 80*l.*, being the amount of the towage remuneration which the plaintiffs lost—as they allege—as soon as the *Kate Thomas* went to the bottom. The facts are not in dispute, but there is a question as to the amount of the towage remuneration that was lost. It is admitted that the tug master's report shews that the tug sustained no physical injury as regards either herself or her equipment. I will dispose at once of the amount of the towage remuneration lost. The plaintiffs say that as soon as the tug had lost her tow she lost 80*l.* The defendant on the other hand contends that by clause 9 of the contract the plaintiffs were entitled to be paid pro rata for the distance towed. The event contemplated in that clause is that which actually happened, namely, the interruption of the towage by an accident. I think that what happened was an accident within the clause. The sea towage being interrupted, the right to recover pro rata given by clause 9 of the towage contract gives the plaintiffs the right to recover pro rata even though the stage of the voyage, in which the tug was at the time the collision occurred, was not completed. It depends upon the mileage towed. It appears that the tug had towed the *Kate Thomas* four-fifths of the distance from Antwerp to Port Talbot at the time of the

1910

REMORQUAGE À HÉLICE SOCIÉTÉ ANONYME DE) v. BENNETTS.

Hamilton J.

collision, and the result is that the damage could not in any event have exceeded 16*l.*

But in my opinion the plaintiffs have no cause of action. The obligation upon the defendant which was broken by his servants was the general one of navigating the seas with reasonable care. In order to give the plaintiffs a cause of action arising out of that breach they must shew not only an injuria, namely, the breach of the defendant's obligation, but also damnum to themselves in the sense of damage recognized by law. This they have failed to do. No doubt, as a direct consequence of the collision, in one sense, the plaintiffs lost the chance of completing their towage contract, because the *Kate Thomas* went to the bottom. If the plaintiffs' cause of action had been completed by damage to the tug inflicted by the defendant's servants whereby the tug was no longer able to tow, then the case would come within Lord Stowell's decision in *The Betsey Caines* (1), and the decision of the House of Lords in *The Argentino* (2) would apply. But all that has occurred is that in the course of performing a profitable contract an event happened which rendered the contract no further performable and therefore less profitable to the plaintiffs. That appears to me to bring the case within the authority of *Cattle* v. *Stockton Waterworks Co.* (3) and within the general statement of the law by Lord Penzance in his judgment in *Simpson* v. *Thomson.* (4) It has been suggested that a distinction can be drawn between a case where the contract has been entered into but performance of it has not been entered upon, in which case it is admitted on the plaintiffs' behalf that the loss does not give a cause of action, and a case where the contract has not only been entered into but performance of it has commenced. No authority has been cited for making such a distinction, and I can see none in principle. I think this case involves the very point anticipated by Blackburn J. in *Cattle* v. *Stockton Waterworks Co.* (3), where in giving judgment he said: "In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that in such a

(1) 2 Hagg. Adm. 28.
(2) 14 App. Cas. 519.
(3) L. R. 10 Q. B. 453.
(4) 3 App. Cas. 279.

1910

REMORQUAGE À HÉLICE (SOCIÉTÉ ANONYME DE) v. BENNETTS.

Hamilton J.

case as that of *Rylands* v. *Fletcher* (1) the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done." It can make no substantial difference whether a contract which has been entered into is already in the course of performance or is only about to be performed. In either case all that has happened is that the conditions under which the contract was performable have been altered by the act of the defendant so as to make them less favourable to one of the contracting parties, namely, to the plaintiffs. I can understand that the law might regard any interference by the defendant with the plaintiffs' contractual chances with a third party as a ground of action in their favour, but I cannot understand why, as the policy of the law excludes a right of action in the one case, where the contract has been made but not performed, it should give a cause of action in the other case, where part performance has taken place. There must therefore be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendant: *Holman, Birdwood & Co.*

(1) (1868) L. R. 3 H. L. 330.

J. E. A.

C. A.
1910
Nov. 15.

[IN THE COURT OF APPEAL.]

KEELING *v.* THE NEW MONCKTON COLLIERIES, LIMITED.

Employer and Workman — Compensation — Death of Workman — Widow — Dependency — Total or partial — Legal Liability to support — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13, "*Dependants*," *First Schedule*, (1.) (*a*) (i.) *and* (ii.).

In questions of dependency under the Workmen's Compensation Act, 1906, *Hodgson* v. *West Stanley Colliery*, [1910] A. C. 229, in no way impeaches or affects *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869, and *Williams* v. *Ocean Coal Co.*, [1907] 2 K. B. 422, as to the implied dependency of the wife on her husband, even when separated from him and not actually dependent upon his earnings.

Per Fletcher Moulton L.J.: Where there was a clear legal liability to support—even though that liability at the moment was being evaded—persons having a legal right to maintenance will not be deprived of their compensation as dependants merely because they were not at the time in fact sharing the earnings of the injured workman. Meaning of "dependants" considered.

Appeal against the award of the judge of the county court of Barnsley upon a claim for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a wife who had not lived with her husband for twenty-two years, and had entirely supported herself in the meanwhile by her own exertions, was entitled on his death by accident to claim compensation from his employers as a dependant.

The facts were shortly as follows:—

The applicant was married to the deceased, a collier, in 1881. She left him in 1888 on account of his cruelty to her, taking her four children away with her. Her husband promised her 1*s.* 6*d.* a week for each child, but as a fact never paid her anything, and she lost sight of him for some time. The applicant lived with her parents and did work at times as a servant, while at times she worked at a factory; the children were with her parents till they grew up. About ten years ago she got work as a housekeeper to a collier at 16*s.* a week, and she was keeping herself in this way. There was no agreement for separation, and

the applicant had not made any application for maintenance against her husband during his lifetime when she did hear of his whereabouts, as she said she was afraid he might take the children from her.

In January, 1910, the applicant's husband met with a fatal accident while employed at the respondents' collieries, and the applicant now claimed compensation under the Workmen's Compensation Act against the respondents as the widow and dependant of her deceased husband.

The county court judge held that there had been no abandonment of her rights by the applicant, and on the footing of partial dependency he awarded her 263*l.* as compensation.

The respondents appealed.

The appeal was heard on November 15, 1910.

Scott Fox, K.C., and *Ellison*, for the appellants. Since the decision in the House of Lords in *Hodgson* v. *West Stanley Colliery* (1) dependency is in each case a question of fact, and on the facts of this case the applicant was not in any way dependent on the deceased and she did not share any of his earnings. *Coulthard* v. *Consett Iron Co.* (2) and *Williams* v. *Ocean Coal Co.* (3) and that line of cases must be taken to be overruled by *Hodgson* v. *West Stanley Colliery.* (1)

[FLETCHER MOULTON L.J. Neither of those cases is referred to in the judgments of the noble Lords.]

Lord Shaw of Dunfermline says (4) the question of dependency is one of fact; whether it exists, and whether it is whole or whether it is partial, all these are questions of fact. *Turners* v. *Whitefield* (5), cited with approval by Lord Shaw of Dunfermline, is exactly in accordance with this contention, and so too is *Lindsay* v. *M'Glashen & Son, Ld.* (6)

Atkin, K.C., and *R. A. Shepherd*, for the widow, were not called upon.

COZENS-HARDY M.R. This appeal is one of a class which is frequently before the Court. Far be it from me to say that it

(1) [1910] A. C. 229.
(2) [1905] 2 K. B. 869.
(3) [1907] 2 K. B. 422.
(4) [1910] A. C. at pp. 238, 239.
(5) (1904) 6 F. 822.
(6) (1908) 45 Sc. L. R. 559.

C. A. 1910

KEELING v. NEW MONCKTON COLLIERIES, LIMITED.

Cozens-Hardy M.R.

does not raise a question of considerable difficulty; far be it from me to say that the decisions in England, Scotland, and Ireland have been uniform upon it; and far be it from me to say that there may not be dicta found in the speeches of one or more of the noble Lords advising the House of Lords in favour of the appellants' contention; but there is no decision of the House of Lords upon this point in their favour, and in my view there are direct decisions of this Court against their contention, which, sitting here, we are bound to follow, leaving it to the House of Lords, if they think fit on directly considering the question now before us, to say whether the view taken by this Court, certainly since 1905, and, I think, earlier, is or is not right and ought or ought not to be upheld.

The facts in this case are extremely short. The accident is admitted, and the only question is whether the widow was dependent wholly or partially upon the deceased miner. [Having stated the facts, the Master of the Rolls continued:—]

The learned county court judge has not found that the widow was wholly dependent, but he has proceeded upon the footing of partial dependency, and has awarded somewhat less than she would have been entitled to if it had been a case of total dependency. Nothing turns upon the figures here.

How do the authorities in this Court stand? In *Coulthard* v. *Consett Iron Co.* (1) there is a very long and careful judgment of Lord Collins, then Master of the Rolls, and of Romer L.J. and of Mathew L.J. dealing with the question of the effect of the presumption in law that a husband is liable to maintain his wife in cases of this kind. In that case the husband and the wife had lived together up to 1904, when he left her, and he never afterwards contributed to her maintenance. Her only means of subsistence, after her husband left her, consisted of casual work and the charitable gifts of relatives, and she was for a week in the workhouse. About three weeks before his death, which occurred in October, 1904, the husband obtained employment, and was earning wages, when his death was occasioned by an accident arising out of and in the course of his employment. The widow stated in evidence that, before

(1) [1905] 2 K. B. 869.

her husband's death, she was expecting him back every day to provide a home. The county court judge found that she was dependent on her husband's earnings at the time of his death, and accordingly awarded her compensation. And this Court held that the facts justified his finding. Lord Collins in that case discussed the Scotch authorities, including *Turners* v. *Whitefield* (1), of which we have heard so much from Mr. Scott Fox, including also two very important Scotch cases of *Sneddon* v. *Robert Addie & Sons' Collieries* (2) and *Cunningham* v. *McGregor & Co.* (3), which certainly qualified, to a large extent, the dicta which are to be found in the first case, though that first case is, for the reasons indicated by Lord Collins, in my view, entirely different from this. It does not rest there. In two cases subsequently this Court has followed that decision. The first case is *Stanland* v. *North Eastern Steel Co.* (4) There the deceased left the applicant. They had lived together for seventeen years. The applicant never heard from him after March, 1904, and did not know where he was. She thought he would come back again. "After her husband left her the applicant maintained herself and her children for some weeks, and then went into the workhouse with them for three months. She afterwards lived with her mother and earned small sums by taking in washing and going out charing. The county court judge held that the applicant was not dependent on the deceased at the time of his death." On appeal to this Court that decision was reversed. We held that there was a presumption of dependency which had not been rebutted, and the decision of the county court judge was reversed, and the case was sent back to him.

In the same year, in the very case in which *Stanland* v. *North Eastern Steel Co.* (4) is reported, there is the decision of this Court of *Williams* v. *Ocean Coal Co.* (5), in which, to the best of our ability, we discussed this whole question, and laid down a certain proposition which has regularly been followed in this Court Perhaps I had better read just this short passage from my judgment (6): "In the case of a wife I think it is

(1) 6 F. 822[1]
(2) (1904) 6 F. 992.
(3) (1901) 3 F. 775.
(4) [1907] 2 K. B. 425, n.
(5) [1907] 2 K. B. 422.
(6) Ibid. at p. 427.

C. A. 1910

KEELING v. NEW MONCKTON COLLIERIES, LIMITED.

Cozens-Hardy M.R.

established by authority that there is a presumption in favour of the dependency of the wife. That was certainly asserted by us in *Stanland's Case*. (1) It is not a presumption which cannot be rebutted, but there are some circumstances which certainly are not sufficient to negative or rebut that presumption. The presumption is not rebutted by the mere fact of desertion. It is not rebutted by proof that de facto not one penny was being contributed by the husband to the wife's support at the time of his death. It is not rebutted by evidence that the wife was in fact being kept alive and maintained by her relations as a matter of charity or kindness. It is not rebutted merely by evidence that the wife is not being supported by her husband, or is maintaining herself by going to domestic service, earning small sums of money as a charwoman, or otherwise. It is not rebutted by proof that she was in the workhouse at the date of his death."

I think that decision is binding upon us. In the present case there is nothing to suggest, or certainly nothing to entitle us to hold, that the separation was a separation by agreement. There is nothing to suggest that there was any sort of release by the wife of the legal obligation of the husband to support her. There is no evidence that anybody else was supporting her in this sense—that she was, as a matter of fact, dependent upon anybody else. There is nothing, in my mind, to rebut that which was the legal presumption which this Court held to exist in the case of *Williams* v. *Ocean Coal Co.* (2)

It seems to me, therefore, that the learned county court judge was perfectly justified in finding as a fact—for after all the presumption of law is evidence of fact—that there was a partial dependency here, and in making the award which he did make.

I only wish just to refer in a very few words to the case upon which Mr. Scott Fox based so much of his argument, the case of *Hodgson* v. *West Stanley Colliery*. (3) That was a case of an entirely different kind. It was one of those very difficult cases which are sometimes called the common purse class of cases where there is the question of who are contributing to the

(1) [1907] 2 K. B. 425, n. (2) [1907] 2 K. B. 422.
(3) [1910] A. C. 229.

support of the whole family. The question there was whether when the husband and the son were both killed in the same accident the wife was partially dependent on both, or wholly dependent on one. The House of Lords, differing from this Court, held that there could be cases of partial dependency both on the husband and on the son, and it reversed the decision of this Court in that particular; but only remotely, only most indirectly, can that case have any bearing whatever upon the case now before us. Although there are some observations of Lord Shaw to which I would desire to pay the utmost respect, I think that it would not be right for us, sitting in this Court, to consider those observations, which were really dicta, as in any way impeaching in this Court the effect of the decisions of this Court.

In my opinion this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons. I base my decision upon this—that there is a series of cases exactly in point in this Court which bind us, until they have been expressly or impliedly overruled by the House of Lords. I do not think that Mr. Scott Fox has been able to shew us anything in the decision in *Hodgson* v. *West Stanley Colliery* (1) in the House of Lords which directly or impliedly overrules those cases, and I cannot believe that the House of Lords would have intended to overrule them without some reference to them, seeing that they are so numerous and have been so constantly acted upon.

But, although that is the basis of my judgment, I wish to say a few words on the question of dependency, and to give my interpretation of the apparent conflict between many of the decisions and many of the dicta on the point. It is clear, when you read the definition of "dependants," that the Act intended to go far beyond anything like legal dependency. The words are: "'Dependants' means such of the members of the workman's family as are wholly or in part dependent upon the earnings of the workman at the time of his death." The consequence is that the Courts have consistently included in the dependants persons who have no legal right of support, but who

(1) [1910] A. C. 229.

C. A. 1910

KEELING v. NEW MONCKTON COLLIERIES, LIMITED,

Fletcher Moulton L.J.

de facto were deriving support from the earnings of the injured man. In support of this principle the dicta in all the cases, perhaps most of all in some of those in the House of Lords, are very strong. They point out that you must look to the question of fact, Aye or No, were they in fact deriving support; and, if they were, and if they are members of the family within the definition of the Act, that is quite enough to include them among dependants. I think that if those cases upon which so much reliance has been placed on behalf of the appellants are examined it will be found that they are all decisions as to including people who have no legal right to maintenance. It is mainly in connection with this right to be included in the definition of dependants that disputes have arisen and given rise to litigation, and it is quite right to say that dependence, so viewed, is a question of fact. But I do not believe for one moment that this definition of dependants was intended to exclude people who had a legal right to maintenance merely because, at the moment, they were not sharing the earnings of the injured man. To my mind it would be shocking if it were the case that, if a father had been neglecting his children so that they ran about the streets, and had to beg, or to live on the charity of their neighbours, the Courts were bound by this definition of dependants to say that these children were excluded from being dependants because at the time of his death they were not participating in his earnings. I think that where there was a clear legal liability to support an individual, even though that liability was being evaded by the injured man at the moment, you have the right to say that that individual was dependent upon his earnings because he or she had the right, if other things failed, to come upon his earnings. Otherwise, as I say, you would be obliged to hold that the misbehaviour of a drunken husband, who is utterly insensible to family ties, would preclude the wife and children from deriving any benefit from the Act, even though they were in a position legally to compel him to maintain them. I am therefore of opinion that dependency may be established by the facts of the case independently of the existence of a liability to maintain, but that this does not exclude its being established by a legal liability, if that legal liability to maintain exists.

FARWELL L.J. I am of the same opinion. We are bound by the decisions of this Court unless and until they are overruled by the House of Lords. Therefore the first question which we have to consider is whether the case of *Hodgson* v. *West Stanley Colliery* (1) does overrule that class of cases to which the Master of the Rolls has referred and to which no reference whatever is made in any of the speeches of the noble and learned Lords. Of course one pays the greatest deference to the dicta of their Lordships, but the dictum of any Law Lord, however eminent, cannot overrule an express decision of this Court. It is only the House of Lords that can do that.

The question, of course, is really one primarily for the county court judge. It is a question of fact, whether the widow was, in fact, wholly, or, if not wholly, partly dependent on the deceased husband, and if partly, how much should be awarded? These questions are for the county court judge, and, unless there was no evidence which would support his finding, this Court cannot interfere. The case of *Hodgson* v. *West Stanley Colliery* (1) was this. This Court had taken the view that the legal liability of the husband meant a total dependency of the wife on him, and excluded the possibility of her being also partly dependent on two sons when they all lived in one house together. That was the proposition that was negatived by the House of Lords. The Lord Chancellor says this (2): "It was argued that the mother was, in the eye of the law, wholly dependent upon her deceased husband, and, being so, could not possibly be in any degree dependent upon her two deceased sons; for that would involve a logical contradiction." Then he says (3): "It is one thing to say that in a particular case a father is partly dependent on his son's contributions because they assist him in discharging his legal duty of maintaining his family. It is quite a different thing to say that in all cases while the father is alive the mother is wholly dependent upon him. I do not see that the latter proposition in any way flows from the former." Lord Macnaghten says very much the same (4): "On this slender basis a theory seems to have been constructed, to

(1) [1910] A. C. 229.
(2) Ibid. at p. 231.
(3) Ibid. at p. 233.
(4) Ibid. at p. 236.

C. A. 1910

KEELING v. NEW MONCKTON COLLIERIES, LIMITED.

Farwell L.J.

the effect that you must shut your eyes to the sources from which the contributions to the family maintenance come; that you must look to the father and the father alone; and that what he spends on the maintenance of his family must be deemed to be his in fact because it may have been his in law."

I will refer to Lord Shaw presently. Those are the propositions which the House affirmed. It was found, in fact, that there were three sources of contribution on which the family lived, and it was held that the fact of the legal liability of the father could not displace the inference properly drawn from the facts of the case, that the money came from the sons as well as the father.

The proposition before us is entirely different. Here the widow went to work as housekeeper for a collier and earned 16*s.* a week. She had done that for years. She was driven from her home originally by the husband's violence. The legal liability remains. It was for the county court judge to find as a fact whether she was wholly or in part dependent upon the legal liability, or whether the money which she received excluded her from being so dependent. That was a question of fact, and I am wholly unable to say that there was no evidence upon which he could so hold. In fact I should have found the same.

But then it is said that there are certain decisions and dicta, and, specially, Lord Shaw's speech is relied upon to shew that we are to exclude the husband's liability altogether. I think it clear from the reports which I have read of the Lord Chancellor's speech and of Lord Macnaghten's speech that they did not take that view. Lord Shaw referred to two cases, namely, *Turners* v. *Whitefield* (1) and an Irish case which I will refer to immediately. If and so far as *Turners* v. *Whitefield* (1) decided anything at all of that kind it is to be found in the dicta of Lord Adam and Lord Kinnear. In that case the widow had, in fact, been entirely supported by her illegitimate son, and there was no question, if that was once proved as a fact, that there was no dependency on the husband at all. But if the dicta referred to mean no more than the Lord President says in *Lindsay* v. *M'Glashen & Son, Ld.* (2), I think that they do not help Mr. Scott

(1) 6 F. 822. (2) 45 Sc. L. R. 559, 561.

Fox's case. He says: "I agree with the opinions expressed by Lord Adam and Lord Kinnear in the case of *Turners* v. *Whitefield* (1) that the fact of the husband being under a legal obligation to support his wife does not alter the fact that she was dependent on him at the time of his death." It does not alter the fact. The fact was proved beyond question; but that does not support the proposition that when there is not support by the husband or any one else, at any rate to the full extent necessary, all resort to the dependency on the husband is excluded.

The other decision which has been referred to was Lord Justice FitzGibbon's judgment in *Queen* v. *Clarke*. (2) The judgment begins at p. 146 and it comes to this. The Lord Justice does not dissent from *Coulthard* v. *Consett Iron Co.* (3) at all if it decided a particular thing which I do not think that it did decide. He says this (4): "I am willing to admit that when a wife has no other means of subsistence it may be reasonable to find as a fact that she is wholly dependent on her husband's earnings, though she is forced to seek charity or to enter the workhouse, to obtain the necessaries of life which her husband had failed to provide for her."

The present case does not differ from but goes a little further than that if I add the words "though she is forced to earn a precarious livelihood by acting as housekeeper to a collier."

I find nothing whatever in either of those cases to shew me that Lord Shaw intended to go further than the other noble and learned Lords in the case before the House of Lords, and I do not think that he did. I think, therefore, that the cases in this Court remain untouched and bind us, and that this appeal fails.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray, for Parker Rhodes & Co., Rotherham; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

(1) 6 F. 822.
(2) [1906] 2 I. R. 135.
(3) [1905] 2 K. B. 869.
(4) [1906] 2 I. R. at p. 145.

W. C. D.

1910
Dec. 5.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* RICHARDS.

Criminal Law—Larceny—Fixtures—Agreement for Tenancy of House—Taking Possession with Intention to steal Fixtures—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 31.

A person who procures possession of a house under an agreement between him and the owner for a lease thereof with the fraudulent intention of stealing the fixtures thereto belonging, and upon obtaining possession severs and steals the fixtures, is guilty of larceny under s. 31 of the Larceny Act, 1861.

Rex v. *Munday*, (1799) 2 Leach, C. C. 850, followed.

APPEAL against a conviction.

The appellant was indicted at the Middlesex quarter sessions under s. 31 of the Larceny Act, 1861 (1), for having stolen certain lead and zinc piping, zinc guttering, iron stoves, tanks and cisterns, then being fixed to certain dwelling-houses, the property of one King.

King was the lessee for a long term of years of fifteen dwelling-houses, five of which were unoccupied, the rest being let to weekly tenants. By an agreement in writing dated July 6, 1910, and made between King and the appellant, it was agreed that the appellant should be entitled to possession of the houses upon the signing of the agreement, and to the rents payable in respect thereof, and that he would within three months at his own cost put the houses into substantial repair and condition to King's satisfaction; that upon completion of the work within the three months King would grant to him a lease of the houses for twenty-one years at a yearly rent, but that if the appellant should fail to commence the work within seven days, or should fail to complete the same in accordance with the agreement,

(1) 24 & 25 Vict. c. 96, s. 31: "Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material or of both, respectively fixed in or to any building whatsoever . . . . shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny . . . ."

King should be at liberty to re-enter and resume possession of the houses, and the agreement should thereupon be determined; and that until the lease should be granted the appellant should be deemed a tenant at will.

According to the evidence for the prosecution the repairs which were necessary to be done to the houses consisted of certain whitewashing, papering and painting, and repairing broken glass. The appellant, when he entered into possession of the houses, took down and removed from some of the houses the zinc guttering and lead piping, some iron stoves, flush tanks, and wood cisterns lined with zinc. All these things were stated to be in good condition.

The chairman, in his summing up, referred to the case of *Rex* v. *Munday* (1), and, after saying that it was almost identical with the present, he directed the jury as follows: "I will ask you to say, did the prisoner Richards get possession of these houses with the fraudulent intention in his mind at the time to defraud his landlord of the goods when he got in possession; and being in possession did he take out these goods with the intent to steal these goods and these fixtures from his landlord? . . . . If it is clear to you as men of the world that it was his intention to act in a fraudulent manner to his landlord and to deprive him of his goods, and that he was carrying out his purpose up to the time of his arrest, you have no alternative but to find him guilty of stealing these fixtures from his landlord." The appellant was convicted.

Lawless, for the appellant. The appellant, being in possession of the houses and fixtures, could not be guilty of stealing the fixtures. Sect. 31 of the Larceny Act, 1861, under which the appellant was indicted, does not apply to a tenant in occupation. Sect. 74 applies to such a case as that, but the appellant was not indicted under that section. The chairman misdirected the jury in telling them that the case of *Rex* v. *Munday* (1) was almost identical with the present one. The head-note in that case states that "a person who procures possession of a house under a written agreement between him and the landlord for a lease of

(1) 2 Leach, C. C. 850.

1910

REX v. RICHARDS.

twenty-one years with a fraudulent intention to steal the fixtures thereto belonging, is, by stealing the lead affixed to the house, guilty of larceny on the statute, 42 Geo. 2, c. 32." Though that Act was in somewhat similar terms to s. 31 of the Larceny Act, 1861, the decision in that case ought not now to be followed. To apply it to s. 31 of the Larceny Act, 1861, would be to apply the doctrine of larceny by a trick to real property. That has never yet been done. Further, there was a false representation in that case, whereas here there was none.

S. C. N. Goodman, for the prosecution. Upon the verdict of the jury it must be taken that the appellant obtained possession of the houses by fraud for the purpose of stealing the zinc and lead piping and other articles from the houses. He never intended to become a tenant at all. The entering into the agreement was a mere trick to get possession of the houses for the purpose of stealing the fixtures. The case of *Rex* v. *Munday* (1) is exactly in point, and it is cited in Archbold's Criminal Pleading, 24th ed., p. 568, as applicable to s. 31 of the Larceny Act, 1861. That case has now stood for 110 years and ought to be followed. Sect. 74 only applies to a tenant in occupation of the house, and therefore does not apply here. But even if it does apply, the appellant was properly indicted under s. 31.

Lawless in reply.

The judgment of the COURT (Lord Alverstone C.J., Pickford and Avory JJ.) was delivered by

PICKFORD J. This case raises the question whether or not we ought to follow the decision in *Rex* v. *Munday*. (1) If that case is to be followed, then a person who procures possession of a house under an agreement for a lease with the fraudulent intention of stealing the fixtures thereto belonging is, by stealing the fixtures, guilty of larceny. In the present case the jury must be taken to have found that when the appellant entered into the agreement for the tenancy of the houses he had no intention of becoming a bona fide tenant of the houses, that is to say, of becoming a tenant for the purpose either of occupying the houses himself or of sub-letting them, but that he entered into the

(1) 2 Leach, C. C. 850.

agreement in order to get possession of the houses for the purpose of stealing the fixtures specified in the indictment. That is what the jury must be taken to have found, and it brings the case within the decision in *Rex* v. *Munday*. (1) It is somewhat difficult to follow the train of reasoning in that case, because the report does not state what the arguments were, nor does there seem to have been any considered judgment or opinion delivered. The judges, however, confirmed the conviction. That case was decided more than a century ago on reference to all the judges, and it has been considered as an authority from that date to the present time. We think that we ought to follow it, and therefore there was no misdirection, and the conviction must stand.

Conviction affirmed.

Solicitor for prosecution : *Director of Public Prosecutions.*
Solicitor for defendant : *Registrar of Court of Criminal Appeal.*

(1) 2 Leach, C. C. 850.

W. F. B.

K. B. D. 1910 *July* 21. C. A. *Nov.* 9.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED *v.* LOCKETT BROTHERS & CO., LIMITED.

Ship—Charterparty—Demurrage—"Working Day"—Custom of Port—"Surf Day"—Construction of Charterparty.

A charterparty, under which the plaintiffs' ship was chartered to carry a cargo of lumber from Vancouver to Iquique, provided that discharge was "to be given with dispatch according to the custom of the port of discharge, but not less than thirty 'mille' per working day." In an action by the plaintiffs against the holders of a bill of lading for the cargo, which incorporated the conditions of the charterparty, for demurrage of the ship through default of the defendants in not discharging at least thirty "mille" per working day, the defendants in their statement of defence pleaded with regard to a certain number of days in respect of which demurrage was claimed, in substance, as follows: that the plaintiffs or their agents knew, or ought to have known, the customs of the port of Iquique when they signed the charterparty; that the customary mode of discharge at Iquique is that ships lie in the bay, and are discharged by means of lighters, which carry the cargo from the ship to the beach; that the same number of days as before mentioned, out of the period between the commencement of the lay days at Iquique and the completion of the discharge of the ship, were "surf days," i.e., days on which the surf on the beach at Iquique is so heavy that "the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable"; that "by the established custom of the port of Iquique "surf days" are not working days, and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on 'surf days,' i.e., days which appear as 'surf days' in the register book kept by the captain of the port at his office"; and that, by the custom of the port of Iquique and of the trade of importing lumber to that port, such days are not within the meaning of the term "working days" as used in such a charterparty as that in question.

An order having been made for the trial of the following question as a preliminary point of law, namely, whether the above-mentioned pleading (assuming for the purpose of the preliminary point of law only that the allegations of fact therein were true) constituted any defence to the plaintiffs' claim, on the trial of that question Hamilton J., following the ruling of Walton J. in *Bennetts & Co.* v. *Brown*, [1908] 1 K. B. 490, gave judgment for the plaintiffs, on the ground that the alleged custom was too uncertain and unreasonable to be admissible

to vary the ordinary meaning of the words "working day" in a charterparty. On appeal:—

Held, reversing his decision, that, on the assumption that the allegations of fact in the defence were true, the alleged custom was a valid custom, and the words "working day" in the charterparty must be interpreted in accordance with it, and that the defendants were therefore entitled to judgment.

TRIAL before Hamilton J. of a point of law raised by the pleadings in an action for the trial of which as a preliminary point of law an order had been made under Order xxv., r. 2.

The action was for demurrage by shipowners against assigns of a bill of lading, by which a cargo of lumber was to be carried by the plaintiffs' ship *Deanmount* from Vancouver to Iquique, and there delivered to charterers or assigns, he or they paying freight for the said goods, and "all other conditions as per charterparty."

By the charterparty it was provided that the charterers should "be allowed for loading and discharging said vessel lay days as follows": namely, thirty "working days" for loading the vessel, to commence twenty-four hours after the vessel was at loading place, and was ready to receive cargo, and the captain had notified the charterers or their agents in writing to that effect, and, as to discharge of the vessel, "Discharge to be given with dispatch according to the custom of the port of discharge (but not less than thirty 'mille' per working day) at such safe wharf, dock, or place as charterers or their agents shall designate." For each and every day's detention by default of the charterers or their agents three pence sterling, or its equivalent, per register ton per day was to be payable day by day by the charterers or their agents to the shipowners. Cargo was to be received and delivered within reach of vessel's tackles, and the vessel was to load and discharge where she could safely lie afloat, but lighterage, if any, to enable the vessel to reach port of discharge was to be at risk of receiver of cargo. The term "mille" is equivalent to 1000 superficial feet of timber. The charterparty contained a clause by which civil commotions, floods, fire, strikes, lock-outs, accidents on railways, and/or docks, and/or wharves, or any other hindrance beyond the control of either party to the agreement or their agents were mutually excepted.

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

The plaintiffs' statement of claim claimed for demurrage at Iquique for forty-five days from December 12, 1907, to January 25, 1908, through default of the defendants in not discharging at least thirty "mille" per working day.

The defendants pleaded in their statement of defence (inter alia) as follows: "(7.) The defendants contend that, on the true construction of the said bill of lading and/or charterparty, no fixed time for taking delivery of the cargo in the said ship was specified in the charterparty, and that the only obligation upon them was to take delivery of the said cargo with all reasonable dispatch, having regard to the actual state of things at the port of Iquique at the time of discharge, and in particular to the custom of the said port, and the defendants say that they duly fulfilled the said obligation. The defendants used all reasonable diligence in taking delivery of the said cargo according to the custom of the said port. The defendants further say that the plaintiffs well knew, or ought to have known, each and every custom of the said port, or, alternatively, that they had notice thereof, either at the time of signing the said charterparty or at the time of loading the said ship, and that, by signing the said charterparty and loading the said ship for the said port, they agreed to be bound thereby. The defendants further say that the plaintiffs' agents or brokers, through or by whom the said ship was chartered, well knew, or ought to have known, each and every custom of the said port. The said charterparty is in the standard form of charterparty for lumber carried to the west coast of South America, and such form has been in regular and universal use in that trade for at least thirty years last past. The said custom and the customary interpretation put upon the said charterparty have for at least thirty years last past been universally and habitually known to and observed by all shipowners, shipbrokers, merchants, and charterers engaged in that trade." Particulars were given in this paragraph, which were, so far as material, as follows: "All vessels discharging at Iquique lie in the bay about a mile, or a mile and a half, from the beach; there are no wharves or piers alongside which vessels can lie. All vessels are unloaded by means of lighters, which take the cargo from alongside, and

land it on the beach, or at one of the moles on the beach. By the invariable practice of the port each lighter is manned by two and only two 'launcheros.' Lumber is dutiable at the port of Iquique, and can only be landed at places specified by the Customs' authorities, and only by special labourers under the control of the Customs' authorities. The place specified by the Customs' authorities for landing the cargo of lumber on board the *Deanmount* was the little cove which lies between the moles of Inglis, Lomax & Co. and Gibbs & Co., and which is under the control of the Customs' authorities, and the said lumber was landed at that place. The *Deanmount*, which carried a cargo of lumber measuring about 1,510,890 superficial feet, arrived at Iquique on the 8th day of October, 1907, and the lay days commenced on the 11th day of October, 1907. The discharge was completed on the 25th day of January, 1908. Between the 11th day of October, 1907, and the 25th day of January, 1908, there were (*a*) 15 Sundays, namely" [here followed dates], "(*b*) 5 holidays, namely" [here followed dates], "(*c*) 15 strike days, i.e. days on which there was a strike of labourers in the port, namely" [here followed dates], "(*d*) 2 martial law days, i.e. days on which martial law was in force in the port, namely" [here followed dates], "(*e*) 20½ 'surf days,' i.e. days on which the surf on the beach, and/or at the moles on the beach, is so heavy that lighters cannot land cargo, and it is dangerous and often impossible for the lightermen to get from the shore to the lighters which are moored in the bay. Upon 'surf days' the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable, and ought not to be, and would not ordinarily be, attempted in the port, although, if the lighters can be reached through the surf, it may not be absolutely impossible to perform that portion of the operation which consists in getting the cargo from the ship into the lighters; but this partial performance of the operation does not in fact accelerate the discharge, because, even if a lighter can be and is filled with cargo on a 'surf day,' it is impossible to empty it on a 'surf day,' and the lighter must remain moored in the bay until the surf abates. The operation of unloading a vessel is not complete until the cargo has been landed

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

from the lighters on the beach, or at one of the moles on the beach. Further, by the established custom of the port of Iquique 'surf days' are not working days, and half 'surf days' are half working days, even though on such days vessels in the bay may be discharging cargo into lighters; and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on 'surf days,' i.e. days or part days which appear as 'surf days' or part 'surf days' in the register book kept by the captain of the port at his office, or, in the alternative, days or part days which are in fact 'surf days' as above described. The decision of the captain of the port as to which days are or are not 'surf days,' or part 'surf days,' is conclusive and binding upon all parties. The following days were 'surf days.'" Then followed the dates. "The customary interpretation put upon a charterparty in the said standard form by all shipowners, shipbrokers, merchants, and charterers engaged in the trade of importing lumber to the west coast of South America is, and has for at least thirty years last past been, that the charterparty embraces, includes, and incorporates each and every custom of the port of discharge, and, in particular, where the port of discharge is Iquique, the custom of that port as regards 'surf days' . . . . as above set forth; that, if the port of discharge be Iquique, the words 'working day' in the charterparty mean what they mean at Iquique according to the custom of that port: and that all parties thereto are bound by such customs. The said customary interpretation has been regularly recognized in practice by all shipowners, shipbrokers, merchants, and charterers engaged in the said trade for at least thirty years last past, and is notorious in the said trade." It appeared that the provisions as to time for loading and discharge were in accordance with the printed standard form of charterparty referred to by the defence as being used in the trade of carrying lumber to the west coast of South America with the exception of the words "but not less than thirty mille per working day," which were interlined in writing.

An order was made under Order xxv., r. 2, that the following question should be set down for trial as a preliminary point of law,

namely, whether paragraph 7 of the defence with the particulars thereunder (assuming for the purposes of the preliminary point of law only that all allegations of fact therein are true) constitutes any defence in law to the claim of the plaintiffs.

Langdon, K.C., and *G. D. Keogh*, for the plaintiffs.
Horridge, K.C., and *Stewart-Brown*, for the defendants. (1)

1910. July 21. HAMILTON J. This is the hearing of a preliminary point of law, whether paragraph 7 of the defence with the particulars thereunder (assuming for the purpose of this point only that all allegations of fact therein are true) constitutes any defence to the plaintiffs' claim. If it does not, the action will be disposed of, without the cost and delay involved in proving those allegations.

The point with regard to surf days is put in paragraph 7 of the defence in three different ways. First it is said that, on the true construction of the charterparty, no fixed time for taking delivery of the cargo is specified; secondly, that, by virtue of the custom of the port of Iquique, the charterparty entitled the defendants to take delivery of the cargo with all reasonable dispatch according to the custom of the port of discharge, and irrespective of any rate of discharge, even in the form of a minimum rate per day; thirdly, that, by virtue of the custom of merchants applicable to this charterparty by reason of its being in the standard form of charterparty for lumber carried to the west coast of South America, the words of the charterparty ought to be so construed as to have the same effect.

I think the case really turns upon the custom of the port of Iquique with regard to "surf days," and, therefore, I will dispose of the other two points first. The clause of the charterparty in question runs thus: [The learned judge here read the clause as to time allowed for loading and discharge of the vessel, and

(1) The only point of law argued seems to have been in relation to the question as to "surf days," upon which question the result of the action appeared to depend, inasmuch as it was admitted that the defendants were entitled to exclude Sundays and holidays and strike and martial law days from the category of working days within the meaning of the clause in the charterparty as to discharge of the ship.

1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

Hamilton J.

proceeded as follows :—] It was contended by the plaintiffs that these words make this a charterparty for a fixed number of lay days. This is not essential to their case, and it seems to me to be clear that this is not a charterparty for a fixed number of lay days, but that the reference to the rate per working day has only the effect of stipulating the minimum discharge per working day. On the other hand it is contended by the defendants that the words "but not less than thirty 'mille' per working day," interlined in the printed form, are not words which in any way limit, restrict, or override the printed words "discharge to be given with dispatch according to the custom of the port of discharge," but are a stipulation in favour of the merchants in order to exclude the shipowners from setting up a custom to give a small daily discharge, and to ensure that the merchants shall at any rate have the quantity mentioned per working day delivered to them. The alternative to that construction is that the clause is a promsie by the merchants, a limitation in favour of the shipowners, that, though they must be content with dispatch according to the custom, they shall, notwithstanding that custom, have not less than thirty "mille" per working day taken out of the ship, so that she may go to sea again as soon as possible. The ship was, according to the charterparty, to deliver cargo within reach of the ship's tackles, and she was to discharge where she could safely lie afloat, which at Iquique was about a mile and a half from the beach. It appears to me that the construction of the clause for which the defendants contend is wrong. The words in question occur in that part of the charterparty where, according to the well-settled interpretation, the receiver's promise in regard to discharge of the cargo is made ; and, as the clause begins, "The party of the second part shall be allowed for loading and discharging said vessel as follows," and goes on, "discharge to be given with dispatch according to the custom of the port of discharge," the express language of the clause bears out the general interpretation placed upon such clauses, and makes it the merchants' promise that, subject to their being allowed lay days "as follows," namely, "discharge to be given with dispatch," they will perform their duty according to the terms used, namely, that they will

give the ship discharge of her cargo, so that she may be set at liberty with dispatch according to the custom of the port of discharge. The words "according to the custom of the port of discharge," however, might involve taking into consideration the state of the crew, and the appliances of the port, at the actual time of the discharge, and that might impose the necessity for a long delay. Accordingly there have been expressly inserted words capable of only one meaning, namely, that of a stipulation in favour of the shipowners, limiting the delay which might otherwise be imposed upon them, by a promise on the merchants' part that, the custom of the port notwithstanding, the discharge shall not in fact be less than thirty "mille" per working day. The alternative suggestion that the object of the clause is to prevent the shipowners from setting up a custom only to deliver quite a small quantity per day in my opinion fails. Customs to discharge small quantities per day, less than can be accomplished with due diligence, are customs which are set up by merchants, not by shipowners, and a ship's interest, when she is lying afloat in an open roadstead, is to get discharged and go away to a safer place as soon as she possibly can.

The third point made in paragraph 7 is that the custom of the merchants there alluded to is applicable to this charterparty, because it is a charterparty in the standard form known for these thirty years last past. The conclusion which I am going to express presently with respect to the custom of Iquique will in many respects be applicable to the custom of merchants in regard to charters to Iquique, but I think on separate grounds that this point is not open to the defendants. The defendants say "the said charterparty is in the standard form of charterparty for lumber carried to the west coast of South America, and such form has been in regular and universal use in that trade for at least thirty years last past. The said custom and the customary interpretation put upon the said charterparty have for at least thirty years last past been universally and habitually known to and observed by all shipowners, shipbrokers, merchants, and charterers engaged in that trade." These words I must interpret. I think that, upon their true interpretation, there is a distinction to be drawn

1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

Hamilton J.

between this charterparty and the standard form. The allegation, under the circumstances, really amounts to this, not that this charterparty is in the standard form, but that part of it is in the standard form. It is impossible for the defendants to say that the charterparty entered into was in all respects in the standard form, which form has been explained to me by the production of a certified copy of the original charterparty, partly in print and partly in writing, with some of the printing altered in red ink and by interlineations between the printed lines. It may very well be that it is the printed portion which the defence refers to, when it says that the said charterparty is in the standard form. It may be that that form has been in regular use for thirty years, and that the custom of merchants with regard to its interpretation has been as alleged. I say nothing as to the difficulty of proving such a custom, or so limiting the sense to be put upon well-known words in the interpretation of an English sentence, but there can be no customary interpretation for the last thirty years applicable to the words "but not less than thirty 'mille' per working day," which are the words inserted by the parties in this case. It appears to me, therefore, that the third point on paragraph 7 fails.

Now comes the real point in the case, which is, I think, not an easy one to decide. First of all, what do the words "per working day" mean, independently of any custom of Iquique? The plaintiffs say that "per working day" is a well-known English expression, which furthermore has been interpreted in many decided cases, and that, according to its English meaning, it includes such days as, according to the defendants' contention, are, by virtue of the custom of Iquique, "surf days" and so not working days. The defendants allege that, as a matter of construction, the words "per working day" in this connection must mean per working day at the place where the matter dealt with in this clause is to be performed, namely, at Iquique. I have come to the conclusion that, as a matter of construction, the expression "per working day" does not exclude "surf days," even though at Iquique they are not regarded as working days. In the first place, the object of this clause is to introduce some sort of certainty as to the extent to which the operation of the

custom of the port of discharge may detain the ship. Therefore one would not expect that construction to be the right one which only reproduced the same kind of uncertainty which already arose on the printed words of the form, and which the parties wished to clear up. In the next place it appears to me that "working day" in this charterparty means something contradistinguished from days which are not working days, a day of work as distinguished from days for play or rest; and I think it is immaterial whether the days for play or rest are so for secular or religious reasons, and whether they are so by the ancient authority of the Church or by the present authority of the State. The words point to days which can be prescribed beforehand as being working days, and not to days whose character as working days or the reverse can only be decided after the event, either upon some investigation of facts, or by the decision of some person whose opinion may be in conflict with the interpretation put upon these words in various cases which may not have been known to him. I think I am bound by the decision of Walton J. in *Bennetts & Co.* v. *Brown* (1), and, whether bound by it or not, I should be very slow not to follow it, when that learned judge has in a case similar to this expressly held that the custom was not admissible. What has been cited to me from the judgment of Lord Esher in *Nielsen* v. *Wait* (2) and that of Lord Brampton in *Saxon Ship Co.* v. *Union Steamship Co.* (3) supports rather than conflicts with this view. The judgment of Buckley L.J. in *Nelson & Sons, Ld.* v. *Nelson Line, Ld.* (4) has also been cited, and I have given it due consideration. If then the matter be simply the construction of the words "per working day," I think the meaning of the words, the indications of the charterparty, and the objects of the contract, all point to reading them as meaning working day in the sense of a day for work as distinguished from a day for rest or for prayer or for pleasure. The particulars make it clear that the character of the "surf day" at Iquique is wholly different from that. I was asked to confine this allegation to the words "by the established custom of the port of Iquique 'surf days' are not

(1) [1908] 1 K. B. 490.
(2) (1885) 16 Q. B. D. 67.
(3) (1900) 5 Com. Cas. 381.
(4) [1907] 2 K. B. 705.

1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & Co., LIMITED.

Hamilton J.

working days and half 'surf days' are half working days, even though on such days vessels in the bay may be discharging cargo into lighters," but that seems to me to be meaningless, unless I go on to inquire what "surf days" really are. According to the defence "surf days" appear to be either "days on which the surf on the beach is so heavy that lighters cannot land cargo, and it is dangerous and often impossible for the lightermen to get from the shore to the lighters moored in the bay," which days are not working days, "even although on such days vessels in the bay may be discharging cargo into lighters," or they are days "which appear as 'surf days' or part 'surf days' in the register book kept by the captain of the port at his office, or, in the alternative, days or part days which are in fact 'surf days' as above described." I think that the character of that description of "surf days" points to its being impossible to tell beforehand with regard to any day whether it is a "surf day" or not, because, even at the beginning of working hours, when you look at the ocean, non constat that the surf may not go down. Part of the day may be a "surf day," and it is essentially a matter as to which there may be a great difference of opinion. It would appear from the defence that on such a day some lighters may be unloading in the bay in spite of the surf, performing the act of getting the cargo from the ship into lighters, and some may be getting out from the shore to the vessels moored in the bay, whilst others are doing none of those things; and the fact that the decision of the captain of the port is described in the particulars as being conclusive and binding on all parties leads me to the conclusion that, as a matter of construction of the particulars, the question whether a day is a "surf day" or not must be decided ex post facto, and is to be decided on the conclusion of the captain of the port. If it involves a decision by the captain of the port, I am bound by the judgment of Walton J. that such a custom is inadmissible in the case of a charter containing the words of the charter now in question. If, on the other hand, the question whether a day is a "surf day" or not is to be decided on the facts, and according to what the day is like and how it goes on, a custom which would make such a day not a working day for the purpose of a contract

with regard to "working days" seems to me both uncertain and unreasonable. If that were the custom of merchants with regard to charters to Iquique, I should equally be of opinion that it was too uncertain and too unreasonable to be available as a defence in the present case. It has been suggested that the custom of the port of Iquique might be introduced for the purpose, not of adding a term to the contract, or explaining what is the proper mode of performing the contract, but for the purpose of interpreting the meaning of "working day" regarded as a term of hours; but it appears to me that, even treating a working day as a term of hours, and not in its ordinary English sense, the custom which is pleaded would not amount to a mere explanation of what a working day at Iquique is, but would make parties who promise to be bound by the words "working day" liable to be bound by something different. The result is that in my view the defendants fail on all points as regards the alleged "surf days," and in none of the three ways in which they put it does the proof of the custom of merchants or of the port amount to a defence to the claim. There must therefore be judgment for the plaintiffs upon the preliminary point.

Judgment accordingly.

The defendants appealed.

Nov. 9. *Bailhache, K.C.*, and *Stewart-Brown*, for the defendants. The charterparty in this case was substantially in the standard form used for the last thirty years in the case of lumber cargoes going to Iquique, with the exception that the words "but not less than thirty 'mille' per working day" were added. It must be taken for the present purpose that the customary interpretation of the standard form has for the last thirty years been that, as used in that form, the words "working days" would not include "surf days" as described in the pleadings. The term "working days" is used in the standard form in the clause providing for the loading of the ship. But, apart from any question as to the interpretation of the standard form, the really important point here is that, according to the allegations

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

of the defence, which must for this purpose be taken to be true, by the custom of the port known to both parties, the term "working days" at Iquique does not include "surf days." There is nothing unreasonable or uncertain in such a custom. Nor is it inconsistent with the terms of the charterparty in any such sense as would render it impossible to import it into the contract. It has been held in many cases that by virtue of a custom a word may bear a somewhat different sense in a particular business or locality from that which it would bear in ordinary English. See for example *Smith* v. *Wilson*. (1) *Bennetts & Co.* v. *Brown* (2), which was a decision by Walton J., is not really on all fours with the present case. The terms of the charterparty there were different. They were "Cargo to be taken delivery of from alongside ship at port of discharge at the average rate of not less than 250 tons per weather working day, (Sundays and holidays excepted) with ten days allowed on demurrage at the rate of four pence per net register ton per day . . . . the cargo to be brought to and taken from alongside at merchant's risk and expense as customary." The judge found in that case that the operation of discharging did in point of fact proceed on the days in question; and he held that the true construction of the charterparty in that case was that it gave a fixed time for discharging, and that the expression "weather working day" in such a charter had a plain meaning in English commercial law, which could not be affected by evidence of such a custom as to "surf days" as was there set up. That decision is not binding on this Court, and the language of the charterparty there was very different from that of the charterparty here in question. The learned judge in the Court below has held that this is not a charter which gives a fixed time for discharging. The decision of the majority of the judges in *Holman* v. *Peruvian Nitrate Co.* (3) really turned on the view that the custom alleged in that case was not sufficiently proved to exist. For the present purpose the statements of the defence are to be taken as being true. [They also cited *Saxon Ship Co.* v. *Union Steamship Co.* (4); *Nelson & Sons, Ld.* v. *Nelson*

(1) (1832) 3 B. & Ad. 728.
(2) [1908] 1 K. B. 490.
(3) (1878) 5 R. 657.
(4) 5 Com. Cas. 381.

Line, Ld. (1); *Bowes* v. *Shand* (2); *Norden Steamship Co.* v. *Dempsey.* (3)]

Langdon, K.C., and *G. D. Keogh*, for the plaintiffs. This charterparty cannot be said to be in the standard form, so far as this case is concerned, because a provision, which is not in that form, and on which the present question turns, was inserted for the protection of the shipowners. The question here is as to the meaning of the words "working day" in that addition to the standard form; and any customary interpretation of the standard form can have nothing to do with that question. Those words were inserted in order to protect the shipowners against the possibility of the detention of their ship in an open roadstead for an indefinite period, and to fix a time within which the cargo must be discharged. The term "working day," as used in a charterparty, has a perfectly plain and definite meaning in English according to the authorities, and only excludes Sundays and such days as are public holidays according to the custom of the locality. The general rule is that, with regard to the discharge of the cargo, the charterer takes the risk of all delays arising from weather, and the construction of this charterparty ought to be approached upon the basis of that doctrine. To import into the charterparty such a custom as is here pleaded would be to deprive the added words of efficacy for the protection of the shipowners to a very large extent. The number of Sundays and holidays which will occur during the period indicated for discharge of the cargo is known, or can be computed before entering into the contract, but it is impossible to say beforehand what days will be "surf days" or will be registered as such by the captain of the port. It is admitted by the pleadings that it may be that work can be and is done on such days in the unloading of ships; and the registration of the particular day as a "surf day" may not take place till late on or after the day in question. Such a custom as is suggested is altogether too uncertain and unreasonable to be admissible to vary the well-ascertained and definite meaning of the term "working day" in a charterparty as interpreted in many cases. In *Bennetts & Co.* v. *Brown* (4)

(1) [1907] 2 K. B. 705, at p. 722.
(2) (1877) 2 App. Cas. 455.
(3) (1876) 1 C. P. D. 654.
(4) [1908] 1 K. B. 490, at p. 497.

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

Walton J. said: "I do not think that the charterers can rely upon any custom which would give any meaning different from their natural sense to the words 'weather working day'—they certainly cannot rely upon any custom which would make the captain of the port a kind of arbitrator who should settle conclusively what was a weather working day and what was not." It is well settled that such expressions as "according to the custom of the port" in this connection relate merely to the manner of discharging ships customary in the port and the appliances with which such discharge is effected, e.g., with lighters, not to the period within which discharge is to take place: *Castlegate Steamship Co.* v. *Dempsey* (1); *Postlethwaite* v. *Freeland* (2); *Gardiner* v. *McFarlane.* (3) If the words "working day" have a well-settled definite meaning, they cannot be qualified by a custom which contradicts that meaning. To introduce this custom would be to introduce utter uncertainty into a clause which was intended to provide for certainty for the protection of the shipowners. [They also cited *Nielsen* v. *Wait* (4); *Niemann* v. *Moss.* (5)]

Bailhache, K.C., in reply.

VAUGHAN WILLIAMS L.J. In my opinion this appeal succeeds, and the judgment of the learned judge below must be reversed. It is necessary, in dealing with this case, to bear in mind the terms of the order for the trial of the preliminary point of law. I do not think the learned judge has, in his judgment, quite kept in mind the term of that order, by which it is to be assumed that the allegations of fact contained in paragraph 7 of the defence and the particulars thereunder are true. The particulars appear to me to make it reasonably clear that there must be taken to be a custom which prevails at the port of Iquique, under which the captain of the port has the power, in the interests of life and property, of declaring a day to be a "surf day," or a half "surf day"; and, as soon as he does that, in my judgment, according to the statements in the defence, it follows that the workmen and others employed in discharging or loading cargoes are under no obligation to work on a day which he has so determined to be a

(1) [1892] 1 Q. B. 54.
(2) (1880) 5 App. Cas. 599.
(3) (1893) 20 R. 414.
(4) 16 Q. B. D. 67, at pp. 70, 71.
(5) (1860) 29 L. J. (Q.B.) 206.

"surf day," or, in the case of a half "surf day," in such portion of the day as he has determined to be a half "surf day." Looking at the pleadings and the allegations therein, I do not understand that what the captain of the port does is, as has been suggested by Mr. Langdon, to act in any way as an arbitrator in a dispute arising after the event between two parties, one of whom is contending that a particular day was a "surf day" and the other that it was not a "surf day." The declaration which he makes in respect of a "surf day" appears to be one which binds all parties concerned in the loading or discharging of ships in the port. Under these circumstances, in my judgment, we must treat the case, as regards this alleged custom, on the footing that there has been proved to be at this port a custom whereby the captain of the port has the wholesome and humane function cast upon him of deciding whether, in this exposed situation, when the surf is running high on the beach, the day is one on which the work of loading or discharging ships cannot and ought not to be carried on. The only other matter which has to be dealt with is whether such a custom is bad for uncertainty. I see no reason for so holding. There is no more uncertainty in it than there is in the question whether a strike was in existence, where there is a clause providing that during a strike loading or discharging is to be suspended. People do not know beforehand, when they are entering into charterparties, whether a strike is going to take place. That is not the kind of uncertainty which would justify us in holding that this custom is too vague and uncertain because it is a custom under which, if the captain of the port decides that a day is a "surf day," the consequences will follow which are mentioned in the pleadings. That being so, what is said further on behalf of the plaintiffs for the purpose of shewing that this custom is inapplicable? It was said that in the defence reliance is placed to a great extent on this being a charterparty in the standard form, but that this is not so, because a special term is introduced by which it is provided that the discharge of cargo shall be "not less than thirty 'mille' per working day." It is said that the effect of that provision is to give a rate of discharge, and that this is inconsistent with the custom which is alleged. I cannot see that this is so. It is not disputed that Sundays and

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

holidays occurring during the discharging of the cargo would not be working days, and they would therefore have to be deducted in calculating the number of working days allowed, and I cannot see any reason in logic or otherwise why the same thing should not be done in regard to days which have been declared to be "surf days" by the captain of the port. I think this appeal must be allowed.

BUCKLEY L.J. For the determination of the point of law now raised I have to assume that all the allegations of fact contained in paragraph 7 of the defence, and in the particulars thereunder, are true. Those allegations group themselves under heads. There are allegations as to knowledge on the part of the two parties to the charter in relation to at least two subject-matters, the first of those being the custom of the port of Iquique, and the second being the customary interpretation which has been placed upon the terms of what has been called the standard form of charter for that and like ports. In the allegations as to what the custom of the port is, there is involved a question as to the meaning of the term "surf day." The pleader tells us what he means by that term, and he puts his interpretation of the meaning in alternative forms. There are also allegations as to what has been the customary interpretation of the standard form for more than thirty years.

The form used in this particular case does not, it is true, throughout follow the standard form. It differs in a material particular. Words are added in this charterparty which are not in the standard form, and upon which the present contest arises. That contest is as to the meaning of the words "working day" in the clause introduced in manuscript into the standard form in the phrase "not less than thirty 'mille' per working day." The words "working days" are to be found also elsewhere in the charterparty, namely, in the clause which provides that the charterers shall have thirty "working days" for loading. The loading in the present case was not, but loading under the standard form might be, at Iquique. It is a relevant matter, I think, to inquire what the words would mean in that case. If a particular meaning is to be attributed to those words in

this charterparty in that case, it seems to me that prima facie they must have the same meaning throughout the document, and therefore in this case. Under these circumstances the first thing to do is to see what the knowledge of the parties must be taken to have been, and what are the facts which must be assumed to be true. I find from paragraph 7 that I must assume that the plaintiffs "well knew, or ought to have known, each and every custom of the said port, or, alternatively, that they had notice thereof." I find further that "the said custom,"—which I am coming to presently—"and the customary interpretation put upon the said charterparty, have, for at least thirty years last past, been universally and habitually known to, and observed by, all shipowners, shipbrokers, merchants, and charterers engaged in that trade," in which class are included the plaintiffs. Then upon the particulars I am to assume this to be true—it is very much a repetition of what has gone before—that "the said customary interpretation has been regularly recognized in practice by all shipowners, shipbrokers, merchants, and charterers engaged in the said trade for at least thirty years last past, and is notorious in the said trade." These are the allegations of knowledge. I have, therefore, to assume that the plaintiffs entered into this charterparty with the knowledge to which I have referred. Then, with regard to the particular custom in question, first I will read what the pleader alleges as to the meaning of the term "surf day." He says that between October 11, 1907, and January 25, 1908, there were "$20\frac{1}{2}$ 'surf days,' i.e. days on which the surf on the beach and/or at the moles on the beach is so heavy that lighters cannot land cargo, and it is dangerous and often impossible for the lightermen to get from the shore to the lighters which are moored in the bay. Upon 'surf days' the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable," so that I am to take it as a fact that on a "surf day," meaning such a day as the pleader is describing, it is commercially impracticable to unload vessels. Lower down, in describing the custom of the port, he says: "Further, by the established custom of the port of Iquique, 'surf

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

Buckley L.J.

days' are not working days, and half 'surf days' are half working days, even though on such days vessels in the bay may be discharging cargo into lighters, and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on 'surf days.'" He then gives alternative meanings to the term "surf days" as follows: "i.e. days or part days which appear as 'surf days' or part 'surf days' in the register book kept by the captain of the port at his office, or, in the alternative, days or part days which are in fact 'surf days' as above described," which latter alternative throws us back to the previous description given of "surf days." Then he goes on to allege in the particulars what is the customary interpretation put upon a charterparty in the standard form. Without reading it all, I see that he says that "the customary interpretation put upon a charterparty in the said standard form by all shipowners, shipbrokers, merchants, and charterers engaged in the trade of importing lumber to the west coast of South America is, and has for at least thirty years last past been, that the charterparty embraces, includes, and incorporates each and every custom of the port of discharge, and in particular, where the port of discharge is Iquique, the custom of that port as regards surf days . . . . as above set forth," and that "if the port of discharge be Iquique, the words 'working day' in the charterparty mean what they mean at Iquique according to the custom of that port." All these statements I have to assume to be true. I have to do, therefore, with a contract between two parties, both of whom knew that, according to the custom of the port, upon certain days, on which the landing of goods was commercially impracticable, work was not carried on. Those days might be days which either were declared to be such by the captain of the port in his register book, or, alternatively, were days which were such in fact, having regard to the description given, a matter which of course might have to be investigated. The allegation is that the plaintiffs, knowing that according to the custom of the port on such days goods could not be unloaded, entered into a charterparty which speaks of a "working day," being a document the customary interpretation of which at that port had for the last thirty years been that

a "working day" at Iquique meant what it meant at Iquique. Those being the facts which have to be assumed, I think that the question of law easily solves itself. We are not, as it seems to me, involved in any general investigation as to the meaning in law of the term "working day." It may be that, upon the authorities, without a context, it bears the meaning of a working day as distinguished from a Sunday or holiday or some day of that sort, and does not prima facie mean a day on which the operation of working can safely be carried on; but, upon the allegations of the defence, admitted for this purpose to be true, it seems to me that this meaning is excluded, because we are told that the contracting parties contracted with the knowledge that in such a contract as they were entering into the term "working day" had not that meaning, but another meaning, namely, that which according to the custom of the port was treated as a working day. As regards the contention that this custom is too uncertain and therefore void, I confess that I do not understand that contention. There may no doubt be a difficulty in ascertaining what a "surf day" is, but there appears to me to be no difficulty or ambiguity, when that is ascertained, in saying that there may be a perfectly good custom that people shall not be bound to work on "surf days." On this pleading no difficulty appears to me to arise, for the pleader has himself told us plainly what he means by "surf day," namely, a day when the sea is in such a condition as to render it commercially impracticable to unload goods. Upon these allegations, admitted as they are for the purposes of the point of law, I am of opinion that Hamilton J. arrived at a wrong conclusion. I do not think he has determined the right point. Upon the allegations the point which arises seems to me to be that which I have endeavoured to state, and upon that I think the appeal must be allowed.

KENNEDY L.J. I agree, but on grounds somewhat less wide than those which have been stated by Buckley L.J., as I understand them. I wish carefully to limit the ground of my decision, because, in my judgment, any other view than that which I am going to express would hardly be reconcilable with

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & Co., LIMITED.

Kennedy L.J.

authorities of many years' standing. The question raised does not appear to me an easy one to decide. I have to start with the premiss that, for the present purpose, we are to accept as being true all the allegations of fact made in paragraph 7 of the defence and the particulars thereunder. I agree with Hamilton J. in thinking that a great deal of what is pleaded is really immaterial. It is of no use, I think, to refer to the standard form of charterparty, because the words with which we have to deal do not appear in the standard form of charterparty, and therefore all the allegations with regard to that form in the pleadings appear to be irrelevant. Further, I agree with Hamilton J. in thinking, and I think it is quite clear, that the real point in this case is as to the meaning of the term "working day" as used in the phrase "not less than thirty 'mille' per working day." That term does not appear in the standard form with regard to the port of discharge, though it does with regard to the port of loading. I approach the question in this case bearing in mind certain established principles. First of all, it is clear that, apart from any custom, risks and contingencies of weather—which of course means, as regards any particular port, those risks, taking into account the topographical position and features of the port—under a clause in a charterparty containing a clause with an ascertained or ascertainable time limit with regard to discharge of the cargo, are risks which in general rest upon the charterer. In other words, the words "working day" in a charterparty cannot, according to our law, be read so as to relieve the charterer in respect of weather which prevents him, unfortunately for himself, from fulfilling his obligations under the charterparty as regards the discharge of the cargo, though of course there may be special words which do so. It is important in this connection to refer to what was said on this point in the considered judgment of Blackburn J. and Lush J. in *Thiis* v. *Byers* (1), which was delivered by Lush J. He there said: "We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any of the ordinary vicissitudes which

(1) (1876) 1 Q. B. D. 244, at p. 249.

may occur to prevent him releasing the ship at the expiration of the lay days." A little earlier the learned judge had said: "The bad weather caused a delay of four days in discharging the ship, and the contention of the defendant was that, as he was not in default, but was ready to receive the timber, but the master was not ready to deliver it, the time lost in consequence of the bad weather ought not to be reckoned as part of the fourteen days"; and then in the last paragraph he says: "The obvious convenience of such a rule"—i.e., that which I have read—"in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to, whatever may be the form of words used in the particular charterparty." I therefore start with the view that, apart from custom, the words "working day" will not exclude days on which work is not in fact done on account of the state of the weather at the port of discharge. Furthermore, I also start with the premiss that the words "dispatch to be given according to the custom of the port of discharge" do not affect the case in any way in favour of the defendants' contention, it being clear, I think, upon the authorities that those words only refer to dispatch according to the manner of discharge in use at that port, the character of the port, and the appliances there available. The law on the subject is summarized by the late Judge Carver in his work on Carriage of Goods by Sea, 5th ed., ss. 614a—618, where he refers to *Gardiner* v. *McFarlane* (1) and the judgment of Lord Blackburn in *Postlethwaite* v. *Freeland.* (2)

Bearing in mind, therefore, the matters which I have mentioned, I have to deal with the question in this case upon the statements made in the particulars to the effect that this charterparty, though made in this country, was made on its face for performance, as regards the discharge of the ship, at Iquique, and that both parties to it knew that, according to the custom of that port, the term "working day" in a charter of this description excluded at any rate a "surf day" which was entered as such by the captain of the port in his register book. The

(1) 20 R. 414. (2) 5 App. Cas. 599.

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & CO., LIMITED.

Kennedy L.J.

question is whether, although there is no authority for construing a charterparty in such terms as these, apart from any custom, so as to exclude such days, it may, nevertheless, be the case that, if the facts alleged are proved, by virtue of a custom of the port such days must be excluded from the category of working days. I have to assume for the purposes of this question that the customary meaning of the term "working day" at Iquique is as alleged in the defence. Though I agree that the judgment of Hamilton J. must be reversed, I desire, as I have said, to limit the ground upon which my judgment proceeds for the following reasons. If the allegation of the custom had merely been that, according to the custom of the port of Iquique, when the weather is such that, although, as stated in the pleadings, some of the work—what is called a partial performance of the operation—can be carried on, there is nevertheless such a risk as is described as regards the safety of life and property in unloading a lighter, and getting it to sea through the surf, or in a loaded lighter coming back through the surf to the shore, the day is not to be counted as a working day—in other words, that days when the weather is bad enough to render unloading dangerous to life and property are to be excluded from working days by the custom—then I should have thought that the criticisms of Hamilton J. upon the alleged custom were sound, and should have agreed that such a custom, which would displace the law that would otherwise be applicable and render a day not a working day by reason of the state of the weather, although part of the work of loading and discharging could go on, is too vague and uncertain.

The difficulty which I feel is enhanced by the fact that in this charterparty, where it is sought to provide against obstacles to discharge of the ship which would have to be proved as facts, such as commotions, floods, fire, strikes, lock-outs, and such like, there is a separate and express clause dealing with them. Unless there was a definite registered non-working day, there would probably be a dispute, and I do not know how it could be settled, because on the facts stated it would appear that some of the vessels in the bay might be working on the day in question and some not, and therefore some might be affected by the surf and not others. But I do not see that the same

considerations apply to the alternative statement that there is at the port by a custom of many years' standing a captain of the port appointed, presumably a competent person, who keeps a register of days on which the work of discharging ships is affected by surf on the beach, and determines whether a day is a "surf day," or a half "surf day," as the case may be, and, therefore, wholly or partially is not a "working day." I do not think that there is any fatal uncertainty in the custom so described. I do not see why, if the parties must, both of them, be taken to have contracted, as I think they must, upon the statements in the pleadings, in view of a definite custom of the port of Iquique to treat as non-working days days which the captain of the port registers as surf days—whether before or after the end of the day, does not seem to me to matter much—that custom is not one which may and ought to be imported into the charter, if the facts with regard to the custom are proved to be as stated.

I have come to this conclusion, I confess with some hesitation, on account, not only of the judgment of Hamilton J., but also of the judgment of Walton J. in *Bennetts & Co.* v. *Brown* (1), in which case he appears to have said that, even if there was evidence that by the custom the captain of the port fixed and settled what days were to be deemed "surf days," the custom would be too vague and unreasonable to form the basis of the contract. He said in that case: "I do not think that the charterers can rely upon any custom which would give any meaning different from their natural sense to the words 'weather working day'—they certainly cannot rely upon any custom which would make the captain of the port a kind of arbitrator who should settle conclusively what was a weather working day and what was not." Nobody could be more disposed than I am to pay respect to anything that was said by a learned judge of such great experience in commercial matters, but I confess that I cannot altogether follow the reasons why he considered that such a custom would be so absolutely unreasonable. In this case, which differs in that respect apparently from *Bennetts & Co.* v. *Brown* (1), we are, upon the allegations in the statement of defence, to assume that

(1) [1908] 1 K. B. 490.

C. A. 1910

BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED v. LOCKETT BROTHERS & Co., LIMITED.

Kennedy L.J.

the contract was made with reference to discharge of cargo at Iquique between parties who were cognizant, not only of the practice by which the captain of the port determined what days were surf days, but also that, if the charter were made in the terms which they used, the term "working day" would not as regards Iquique by the custom be read as applicable to a "surf day" registered as such in the register kept by the captain of the port. Under these circumstances some of the cases relied upon by the plaintiffs' counsel do not seem to me to be applicable. In this case there must be assumed to be a custom known to both of the contracting parties, namely, that the words "working day" in the charterparty would have a special sense in accordance with the custom; and it appears to me that, this being so, it follows that, if the facts as to the custom are proved as stated in the first of the two alternative forms in which the pleader has alleged the custom, the days in question ought not to be counted as working days within the meaning of the clause in the charterparty which provides that the discharge is to be of not less than thirty "mille" per working day. For these reasons I think that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool.*

Solicitors for defendants: *W. W. Wynne & Sons, for Evans, Lockett & Co., Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 26, 28.

METROPOLITAN WATER BOARD *v.* BROOKS.

Waterworks—Small Tenements—Water Rate payable by Owner—Receipt of Rent as Agent or Receiver—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 72.

A water company's special Act provided, in terms substantially identical with s. 72 of the Waterworks Clauses Act, 1847, that, in the case of houses or tenements not exceeding a given annual value, the owner instead of the occupier should be liable for the water rate, and that "the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein" should for that purpose be deemed the owner of such house or tenement. The water company supplied water to a block of flats which were respectively within the statutory limit as to value. The premises were mortgaged and a receiver was appointed under a receivership deed. The mortgagor appointed another person collector of the rents, who handed over the rents intact, at first to the mortgagor, and subsequently to the receiver:—

Held (reversing Channell J.), that the collector and not the receiver was the person liable under the special Act to pay the water rate.

Decision of Channell J., [1910] 2 K. B. 134, affirmed on different grounds.

Appeal from a decision of Channell J. (1)

In January, 1903, Abraham Davis, who was then engaged in building six large blocks of residential flats on leasehold sites in Morgan Street, Commercial Road, known as 1 to 6 Morgan Mansions, entered into agreements with the East London Waterworks Company under s. 80 of their special Act of 1853 (16 & 17 Vict. c. clxvi.) for the supply of water by meter to these six blocks, and thenceforward water had been supplied to the premises by meter down to the present time, at first by the East London Company, and since Midsummer, 1904, by the plaintiffs, who had acquired the East London Company's undertaking. No payment had been made in respect of the water supplied since Midsummer, 1904. The several flats or tenements of which 1 to 6, Morgan Mansions consisted were all, with a few exceptions, of an annual value not exceeding 20*l.* They were let on weekly tenancies. At various dates in 1903 Davis mortgaged

(1) [1910] 2 K. B. 134.

C. A. 1910

METROPOLITAN WATER BOARD v. BROOKS.

these blocks of flats to the Norwich Union Life Insurance Society, and in August, 1906, the society agreed to advance a further sum upon the mortgaged premises upon the terms that the defendant, J. McM. Brooks, who was their surveyor, should be appointed receiver of the rents and profits. Accordingly by an indenture dated August 11, 1906, the defendant was appointed to be the receiver of the rents and profits of the premises and to stand possessed of the rents and profits so received upon trust to pay thereout the rent payable under the indentures of lease under which the properties were held, and also all outgoings payable by the mortgagor as lessee or by persons deriving title under him, and also all rates and taxes and other outgoings whatsoever affecting the mortgaged property, and to retain for his own use as remuneration for his services a sum not exceeding 5 per cent. on the gross amount of the rents, and, after making such payments and allowance, upon trust to pay to the society the interest on the principal moneys due to them and to pay the surplus of the rents to the society or to a bank at their option as a fund to provide the future interest accruing to the society. Nothing was done under this receivership deed for some considerable time. In January, 1907, one Smith was appointed by Davis manager and collector of the rents of these flats, and it was part of his duty to relet them as they became vacant. Smith collected the rents until November, 1909, when he was discharged. Until November, 1907, he paid the rents to a clerk in Davis's office; afterwards he paid them to the defendant or his clerk.

By s. 81 of the special Act of 1853, "The owners of all houses and parts of houses occupied as separate tenements and not respectively exceeding the annual value of 20*l.* shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof under this Act instead of the occupiers thereof; and the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein shall for that purpose be deemed the owner of such house or tenement."

Except that 20*l.* was substituted for 10*l.* as the limit of annual

value, this section was substantially a re-enactment of s. 72 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which was incorporated with the special Act. By s. 3 of the general Act "water rate" is defined as including "any rent, reward, or payment to be made to the undertakers for a supply of water."

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall . . . . be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered with the costs incurred from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered."

In July, 1908, the plaintiffs brought two actions in the Westminster County Court against the defendant, as being the owner of the premises within s. 4 of the Act of 1887, to recover arrears of water rate due under the agreements of 1903. These actions were transferred to the High Court. The plaintiffs claimed 468*l.* 12*s.* for arrears in respect of all the six blocks of tenements from Midsummer, 1904, to Lady Day, 1908.

Channell J., upon the question whether the defendant or Smith was the person liable to pay the rate under s. 81 of the special Act of 1853, was of opinion that "agent or receiver" in that section clearly meant a person who was something in the nature of a manager, agent, or receiver, either having actual authority to pay the current outgoings in respect of the property, or, if not having actual authority, being in a position from which he might be presumed to have authority to pay the outgoings, and that a person who merely had the manual receipt of the rents, such as this rent collector, who went to the premises and actually received the rents and gave receipts to the tenants and forthwith handed over the money to a clerk in Davis's office or in the

C. A. 1910

METROPOLITAN WATER BOARD v. BROOKS.

defendant's office, was not an agent or receiver within the statute. That observation did not apply to the defendant, who had full powers under the receivership deed, and he thought that the defendant clearly came within the position of an agent or receiver under this section. However, upon the construction of s. 4 of the Act of 1887 he came to the conclusion that the word "owner" in that section did not include a mere constructive owner such as an agent or receiver. He therefore gave judgment for the defendant.

The plaintiffs appealed.

Danckwerts, K.C., and *A. B. Shaw*, for the appellants. First, under s. 81 of the East London Waterworks Company's special Act of 1853, which, except as to the amount of the limit as to annual value, is substantially identical with s. 72 of the Waterworks Clauses Act, 1847, the respondent was the agent or receiver of the rents, and as such must be deemed to be the owner of the tenements. Secondly, "the owner for the time being" under s. 4 of the Water Companies (Regulation of Powers) Act, 1887, must mean the same person as the owner in the Acts of 1847 and 1853. Upon the first point the words "agent or receiver" in s. 81 point to a person who can properly be expected to make deductions from the money received, and not to a person whose duty it was simply to hand over the money intact to the person entitled to receive it, and therefore the respondent and not Smith is the person deemed to be the owner within that section. The section does not include a mere sub-agent or servant such as Smith was; and the question is not concluded by the mere physical receipt of the money. The respondent received the money by the hands of Smith. Channell J. was in favour of the appellants on this point, and there was evidence upon which he could find that Smith was not the person contemplated by the Act. [They cited *Cook* v. *Montagu*. (1)]

[The COURT intimated that they would give judgment on this point without hearing the arguments on the second point.]

C. A. Russell, K.C., and *Giveen*, for the respondent.

(1) (1872) L. R. 7 Q. B. 418.

C. A. 1910

METROPOLITAN WATER BOARD v. BROOKS.

COZENS-HARDY M.R. This is an appeal by the Water Board against a decision of Channell J., who held that the defendant Brooks, who was a receiver appointed under a receivership deed between Davis as mortgagor and the Norwich Union as mortgagees, is not liable to pay arrears due in respect of water rates on small tenements. Channell J. has held that the Water Board are wrong, and has based his judgment upon s. 4 of the Water Companies (Regulation of Powers) Act, 1887. Without expressing any opinion in the least adverse to the view of Channell J. on that point, I think that the Water Board are met by a difficulty at an earlier stage. By s. 72 of the Waterworks Clauses Act, 1847, which is so nearly identical with the special Act of the East London Waterworks Company that I do not care to point out the differences, provision is made that in the case of these tenements the owners are to be liable and not the occupiers. Then it goes on "and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof, on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." What are the facts here? These small tenements belonged to Davis. He was a long leaseholder and he built the houses. He appointed one Smith in January, 1907, to collect the rents of the houses in question. At that time what was the position? Smith was a man who was appointed by Davis agent to collect the rents of these houses, and authority was given to him, according to Smith's own evidence, to relet any houses which became vacant. It seems to me that Smith was exactly and precisely the person, and the one person, who is contemplated by s. 72 of the Act of 1847. At this time the property was subject to a mortgage given to the Norwich Union in the year 1903, and the mortgage was accompanied by a receivership deed under which Brooks was appointed receiver. Smith during the earlier part of his employment handed over the rents to Davis, and subsequently he handed them over to Brooks. There was no suggestion of any fresh appointment of Smith by Brooks. All that appears is that Smith continued until some time in 1909 to collect the rents as he had done before with, apparently, such authority as he had before, namely, to

C. A. 1910

METROPOLITAN WATER BOARD v. BROOKS,

Cozens-Hardy M.R.

relet. We have nothing to do here with the period when Brooks entered into possession in the sense that he turned out Smith. We have only to deal with the time before Smith was turned out. In those circumstances, there being no evidence whatever as to the relations between Brooks and Smith, it seems to me that from first to last Smith was the person who received the rents and profits from the occupiers as agent for the persons interested therein, and that Smith, and Smith only, is the person who can really be sued in respect of this transaction. For these reasons I think that the learned judge was perfectly right in the conclusion at which he arrived, although I prefer to base my judgment upon the ground I have stated. I cannot help thinking that this is a decision very much in the interests of the water company. The effect of the section is shortly this, as I read it: An agent or receiver to collect the rents has prima facie no right to do anything more than to hand over the rents which he receives to his employer. He has no right to pay rates and taxes out of the rents, but he is bound to hand the rents directly to his employer. But here, apparently, the Legislature intervenes and says "For the benefit of you, the water company, there is an express provision, which is not merely a power but imposes an obligation upon the agent to pay this water rate and to hand over the balance only to his employer." If that is the meaning and effect of the section I should have thought it very much to the benefit of the water company, but, whether it is to the benefit of the water company or not, it is a construction which commends itself to me, and, with the utmost respect, I cannot follow on this point the judgment of Channell J., who seems to think that the words "agent or receiver" must be limited to an agent or receiver who had power to make these deductions. The answer is, whether he has power or not, he acquires power by virtue of the express provision in this section. In my opinion this appeal fails and must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion for the same reasons, and I think it is unnecessary to deal with the other points in the case.

FARWELL L.J. I agree. It appears to me that the justification for s. 72 is that the man who, being an agent, is made personally responsible is the man who actually receives the rents, out of which he is to pay the water rate, from the occupiers. Channell J. has suggested that he must be a receiver who is appointed with power to make these deductions. But in this particular case the receivership deed did not allow the receiver to make these deductions first, but only after paying certain charges, which would not satisfy the Act at all. The agent is made responsible because he does receive the rents and then stops these preferential payments out of them first. Here we have a very ordinary case: A number of mortgages existed; a further charge was then made, and the Norwich Union, the mortgagees, required that that further charge should be accompanied by a receivership deed. That was done in 1906. Notwithstanding that, the receiver does not act, as is also very usual. In 1907 the mortgagor, notwithstanding the receivership deed, appoints his own agent to collect the rents. There is no evidence that Brooks ever appointed Smith as his agent, and it is exceedingly improbable that he should. The conclusion is irresistible to my mind that Smith at first took the rents to Davis or paid them over into his, Davis', bank, and that subsequently Davis told him to pay them to Brooks instead. Smith was from the commencement the actual instrument to receive the rents on Davis' behalf, and is clearly in my opinion the agent or receiver within s. 72. On the other point I see no reason to differ from Channell J.; we have not heard it fully argued. This point, in my opinion, disposes of the appeal.

Appeal dismissed.

Solicitor for appellants: *W. Moon.*

Solicitors for respondent: *Hartcup, Davis & Cobbold, for W. T. Hartcup, Norwich.*

H. B. H.

1910
Oct. 22.

RICHARDS *v.* STARCK.

Gaming—Gaming or Wagering Contract—Stockbroker—Payment of Deposit—Profit on Rise in certain Stocks—Repayment of Deposit in any Event—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

The defendant, who was a dealer in stocks and shares, issued a circular which stated that upon payment of a subscription of 5*l.* or some multiple thereof the subscriber would be entered in the defendant's three months' trust in respect of a certain number of shares in three named stocks, and the subscriber would then be entitled to the profit arising from the difference between the prices of the stocks on the opening day of the trust and the prices at the end of ninety days from that date, less 10 per cent., together with repayment of the subscription; and in the event of there being no such profit the subscriber would be entitled to the return of his subscription. The plaintiff paid to the defendant a subscription of 20*l.* upon the terms of the circular, and at the end of the ninety days there accrued a profit upon the prices of the stocks. The plaintiff also paid to the defendant a subscription of 20*l.* in respect of a similar trust, which resulted in a loss. The defendant repaid to the plaintiff the amount of his subscription in respect of the first-named trust. In an action to recover the amount of the profit less 10 per cent. in respect of the first-named trust and the 20*l.* subscription in respect of the second trust:—

Held that, though the subscriber was, under the terms of the circular, in any event not to lose his subscription, yet, inasmuch as he would lose interest upon the amount of the subscription, there was a sufficient loss to make the contracts gaming or wagering contracts within s. 18 of the Gaming Act, 1845, and that the plaintiff was not entitled to recover.

The definition of gaming and wagering by Cotton L.J. in *Thacker* v. *Hardy*, (1878) 4 Q. B. D. 685, at p. 695, considered.

Trial of action before Channell J. without a jury.

The action was brought to recover the sum of 157*l.* 14*s.* 1*d.* in the following circumstances.

The defendant, who carried on business in London under the style of McKinley, Alexander & Sons, as general investment brokers and dealers in stocks and shares, on February 9, 1910, issued a printed circular which stated that they were opening a trust No. 7 on the 11th inst., and that, to explain what a "trust" meant, "We beg to state that there are three methods by which one can speculate in shares and stocks." The circular then stated that the third method was that of dealing with trusts, which were originated by McKinley, Alexander & Sons,

1910

RICHARDS v. STARCK.

and that their three months' trust differed materially from all others "in that you pay a subscription of 5*l.* or 10*l.*, which for your convenience can be divided into two payments (one half with the application and the other half ten days later). This payment of 5*l.* or 10*l.* can be made in multiples of 5*l.* or 10*l.* so that a client can take five 10*l.* subscriptions by remitting 25*l.* with application and 25*l.* ten days later . . . . This 5*l.* subscription or multiple of 5*l.* subscription is all the payment exacted from him, and this subscription is repaid in full in any event at the termination of the ninety days." The circular then pointed out that the liability was limited to the payment of the subscription, and that loss was impossible as the subscription would be repaid at the end of ninety days, and proceeded: "Having paid us your 5*l.* or 10*l.*, or multiple of 10*l.*, we enter you into our three months' trust for the specific day advertised, and this being done you are entitled to the rising profit of sixteen shares of each kind advertised, which profit represents the difference between the opening prices in the London Stock Exchange of the morning of the trust and the closing prices in the London Stock Exchange at the last quotation of the closing day, i.e., ninety days after your trust has started. We always select three stocks which in our judgment appear the best, on the theory that no man shall put 'all his eggs in one basket.' If one or two of the stocks lose, the other may gain, and vice versa. In this particular case advertised as trust No. 7, we have selected at a 10*l.* subscription sixteen Southern Pacifics, sixteen Canadian Pacifics, and sixteen United States Steel Common." The circular further stated that "you are only speculating between the opening price of the 11th February and the closing price of the 11th May," and that the profit would be paid on the Stock Exchange pay day following the May 11 account, and that McKinley, Alexander & Sons charged 10 per cent. of the gross profit, which was not a commission, but was the subscriber's share of the outlay in getting the trust together, &c., the net amount of the profit being payable in full and the subscription returned as well; and "if there is a loss, and the aggregate of the forty-eight shares have not made any rising profit, you still receive your subscription payment back in full . . . . You will naturally

1910

RICHARDS v. STARCK.

inquire, 'who stands the loss?' This is very simple, and we are pleased to say that there hardly is a loss to stand. Having bargained with you as principals on our part that you shall receive the profit difference ninety days hence, it is left to our own discretion to use the intervening market fluctuations up and down to our own advantage. . . . . Say Southern Pacifics opened in your trust at 124, we would perhaps, being in touch with the markets both in New York and here, not buy at that figure, when the market is unsettled, but buy later when they have dropped to 122 as an instance . . . . and in the six accounts of fourteen days which cover the ninety day period, we have, perhaps, twenty chances to sell and buy cheaper, or to buy cheap and sell higher, manipulating the account up and down according to our judgment."

On February 10, 1910, the plaintiff sent to McKinley Alexander & Sons the sum of 20*l.* for their trust No. 7, and on February 11 McKinley, Alexander & Sons sent him the following receipt:—"We have received from you the sum of 20*l.* being full payment for a 20*l.* subscription to our American three months' trust, No. 7, on sixteen Southern Pacifics, sixteen Canadian Pacifics, sixteen United States Steel Common. We hereby reserve you any profit which may accrue on the above-mentioned shares, which profit shall represent the difference in the opening prices of these shares to-day and the closing prices of these shares ninety days hence inclusive; out of which profit you agree we shall retain 10 per cent. working charges, and being principals in this transaction we guarantee you against the loss of your 20*l.*, and it is further understood that you incur no liability beyond the 20*l.*"

On May 11, 1910, there was a profit upon the above-named three stocks (as shewn by a statement of account rendered by the defendants to the plaintiff) after deducting the 10 per cent. of 107*l.* 14*s.* 1*d.* The subscription of 20*l.* was repaid to the plaintiff, but not the profit. The plaintiff also subscribed 50*l.* to three subsequent trusts of a similar kind, each of which resulted in a loss.

The claim in the action was to recover this latter sum of 50*l.* and the 107*l.* 14*s.* 1*d.*, the amount of the profit above

mentioned. (1) Upon an application for leave to sign final judgment the defendant set up the defence (so far as material to this report) that the transaction was a wagering transaction, and he obtained leave to defend, the action being ordered to be entered in the list for hearing under Order XIV., r. 8.

J. W. McCarthy, for the plaintiff. This is not a gaming or wagering contract within s. 18 of the Gaming Act, 1845. Gaming and wagering is defined by Cotton L.J. in *Thacker* v. *Hardy* (2) thus: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." That definition was cited with approval by Lord Herschell L.C. when delivering the judgment of the Privy Council in *Forget* v. *Ostigny*. (3) In the present case there could be no loss in either event to the plaintiff. He was to get back his deposit whether the stocks rose or fell in price. With regard to the claim to recover the amount of the deposits, the true nature of the transaction was that those sums were lent to the defendant, and it was immaterial to the plaintiff how the defendant was going to deal with those sums. The defendant, so far as the plaintiff knew, might have invested those sums, or he might have gambled with them. The plaintiff can therefore recover the sums deposited with the defendant. He can also recover the amount of the profit claimed. The defendant, though he calls himself in the documents a principal, was in truth the plaintiff's agent to make a profit for him by means of the use of the sums deposited. The true nature of the transaction and the real position of the parties must be looked at. The true position of the defendant was that he was the plaintiff's agent. It is clear from the documents that the interests of the plaintiff and of the defendant were identical. The plaintiff was not dealing with the defendant as a principal so that the

(1) It was stated that the plaintiff subscribed sums, amounting to 38*l.*, to two other trusts, both of which resulted in a loss, and that he was repaid his subscriptions by the defendant.

(2) 4 Q. B. D. 685, at p. 695.

(3) [1895] A. C. 318, at p. 326.

1910

RICHARDS v. STARCK.

loss of the one would be the gain of the other. The defendant was acting in the transaction as the plaintiff's agent to deal with the money, and as the defendant has made a profit out of it the plaintiff is entitled to recover the amount of that profit from the defendant subject to a deduction of 10 per cent.

E. M. Pollock, K.C., and *D. M. Hogg*, for the defendant. The contract is one by way of gaming or wagering. The documents shew that the subscription is paid as an entrance fee in order to participate in the possible profits which may arise from a gamble in certain specified shares. The real nature of the transaction and not the mere form of it must be looked at: *Carlill* v. *Carbolic Smoke Ball Co.* (1) The real transaction is a wager or bet between the plaintiff and the defendant as principals upon the difference between the prices of the specified stocks on the day of the opening of the trust and their prices ninety days later. The whole transaction is gaming and wagering and the subscription cannot be severed from the profits. The wager is no doubt made upon terms favourable to the plaintiff, because he is to get his subscription back in any event. Notwithstanding that, the transaction is gaming and wagering within the definition given by Cotton L.J. in *Thacker* v. *Hardy* (2), because, although under the terms of the contract the plaintiff is not to lose his subscription in either event, he will, if there are no profits, get back his subscription without interest, and will thus have lost the interest upon it for three months. Sect. 18 of the Gaming Act, 1845, applies so as to prevent the subscription being recovered: *Strachan* v. *Universal Stock Exchange* (*No.* 2). (3) Moreover, s. 1 of the Gaming Act, 1892 (55 & 56 Vict. c. 9), prevents the subscription being recovered: *Tatam* v. *Reeve* (4); *Carney* v. *Plimmer* (5); *Saffery* v. *Mayer*. (6) Sect. 18 of the Act of 1845 also prevents the profits being recovered. The defendant was not the plaintiff's agent to speculate. They were both acting as principals. The plaintiff had no control over the defendant as to how the latter should use the subscription. The

(1) [1892] 2 Q. B. 484, at pp. 491, 492.
(2) 4 Q. B. D. at p. 695.
(3) [1895] 2 Q. B. 697.
(4) [1893] 1 Q. B. 44.
(5) [1897] 1 Q. B. 634.
(6) [1901] 1 K. B. 11.

plaintiff therefore is not entitled to recover. [They also referred to *Rourke* v. *Short* (1); *Strachan* v. *Universal Stock Exchange* (2); *In re Cronmire, Ex parte Waud* (3); *Saxby* v. *Fulton*. (4)]

J. W. McCarthy in reply. The loss of the interest on the deposit is so unsubstantial that it ought to be ignored, and if so the plaintiff does not in any event lose anything. The contract, therefore, is not a contract by way of gaming or wagering within the definition in *Thacker* v. *Hardy*. (5)

CHANNELL J. This case raises a somewhat novel point under the Gaming Acts. I may say that one naturally struggles in a case like this to enable the person who has paid money to another under the temptation of an advertisement such as is before me to recover back the money which he has so paid where he has substantially been successful. But one cannot always do it.

In this case the scheme which the defendant has adopted is a very ingenious one, but the substance of it seems to me to be clear, and I can state it shortly. A person who desires to participate in the scheme deposits a sum of money, whether 5*l*. or 10*l*. or some multiple thereof, with the defendant, who is to be at liberty to speculate with it on the Stock Exchange in certain stocks, and if at the end of three months from the date of the deposit the price of those stocks is higher than the price at the date when the deposit is made the defendant undertakes to pay to the depositor the amount of his deposit and also the amount of the rise in the price of the stocks less 10 per cent. upon this latter amount. The depositor has nothing to say to the speculations of the defendant during the three months from account day to account day on the Stock Exchange, but so certain is the defendant that he will make a profit by his speculation in the stocks that he undertakes to repay to the depositor at the end of the three months the amount of his deposit in the event of the particular stocks not having risen in price. That is the contract between the parties in this case. The question which I have to decide is whether that is a contract by way of gaming or

(1) (1856) 5 E. & B. 904.
(2) [1895] 2 Q. B. 329; [1896] A. C. 166.
(3) [1898] 2 Q. B. 383.
(4) [1909] 2 K. B. 208.
(5) 4 Q. B. D. at p. 695.

1910

RICHARDS v. STARCK.

Channell J.

wagering. In *Thacker* v. *Hardy* (1) Cotton L.J. gave a definition of gaming and wagering within the meaning of s. 18 of the Gaming Act, 1845, and that definition was cited with approval by Lord Herschell when delivering the judgment of the Privy Council in *Forget* v. *Ostigny*. (2) That definition, which has, if I recollect rightly, been generally accepted since that time in many other cases, was laid down in 1878, and one is not surprised to find that, owing to the ingenuity displayed by people since that time, a state of things has arisen which makes one doubt whether that definition can be treated as exhaustive. The definition given by Cotton L.J. is this: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." In the present case the rights of the plaintiff under the contract depended upon a future event which at the date of the contract was of an uncertain nature; that is to say, the rise or fall in the market of the price of the particular stocks which were to be dealt in. In the event of the market price of the stocks rising the plaintiff was to win, because he would get his deposit back with an addition to it depending upon the amount of the rise in the price of the stocks. In the present case he would win a very large amount, namely, 107*l.* in addition to his deposit of 20*l.* That was one event. What was the other event? According to Cotton L.J., that the plaintiff should lose. The plaintiff was not to lose, strictly speaking, in either event, because if the future event went against him, that is to say, if the price of the stock was not higher at the end of the three months than at the beginning, he was to get his deposit back. Does that prevent the contract being a gaming or wagering contract? In my opinion it does not. The transaction was in the nature of a wager or a bet on terms very favourable to the plaintiff, that the market price of the particular stocks would rise, so that if the price of the stocks rose the plaintiff was to have his deposit back and a large proportion of the amount of the rise, and even if the price did not rise he was to have his deposit returned to

(1) 4 Q. B. D. 685, at p. 695. (2) [1895] A. C. 318, at p. 326

him without interest. Therefore in one sense the transaction involves no loss in any event to the plaintiff, as he was to have his money returned to him, though without interest. But the plaintiff has lost the interest upon his deposit, and that is, to my mind, sufficiently a loss to bring the contract within the spirit though not perhaps within the actual wording of the definition; and I have the less hesitation in saying so inasmuch as the other event clearly comes within the definition. In my opinion, therefore, this is a contract by way of gaming or wagering within the meaning of s. 18 of the Gaming Act, 1845, and the plaintiff is not entitled to recover. I do not think that the Gaming Act, 1892, applies to this case. No doubt it may be argued that the Act of 1892 avoids the promise by the defendant to repay at the end of three months the money which has been deposited with him in reference to the event. To my mind the words of the Act are not applicable to a case of repayment of money; they are meant to apply to the case of a third person. I do, however, see that in *Carney* v. *Plimmer* (1) Lord Esher used words which seem to suggest the possibility that the Act of 1892 may cover the case of payment to a person of money which in a certain event he is to repay, and, if that is so, it may be that this Act strengthens the case. But I have so much doubt whether the language of the Act of 1892 applies to the case of a promise to repay money paid that I prefer to rest my judgment upon the Gaming Act, 1845. This is a gaming and wagering contract within the spirit of the definition given by Cotton L.J. and is rendered null and void by s. 18 of the Act of 1845. There must therefore be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Indermaur & Brown, for T. H. Moore, Coalville.*

Solicitors for defendant: *Roger, Sadd & Stollard.*

(1) [1897] 1 Q. B. 634.

W. F. B.

1910
Nov. 30.

GADD *v.* THOMPSON.

Infant—Apprenticeship Deed—Covenant not to practise within certain Area after Cessation of Apprenticeship—Breach of Covenant—Injunction.

The rule that an action will not lie to enforce a covenant entered into by an infant in an apprenticeship deed applies only to covenants which it is sought to enforce during the currency of the apprenticeship. A covenant to do or abstain from doing something after the apprenticeship shall have ceased may, provided that the deed as a whole was for the apprentice's benefit, be enforced against him by action.

By a deed of apprenticeship the defendant, an infant, bound himself apprentice to the plaintiff in his business as an architect and surveyor for the term of four years. The deed contained a covenant by the defendant not to carry on within ten years after the expiration of the term the business of an architect or surveyor within ten miles of the town where the master resided. There was evidence that no architect in the town would accept as an apprentice a person who refused to enter into a similar restrictive covenant:—

Held, (1.) that, having regard to the impossibility of the defendant obtaining instruction except upon the terms of his entering into the covenant, the covenant was reasonable; (2.) that as it did not come into operation until after the termination of the apprenticeship it was enforceable against the defendant by injunction.

Appeal from the Bromsgrove County Court.

By an indenture of apprenticeship dated May 7, 1902, made between the defendant, Robert Thompson, and his father, William Thompson, of the one part, and the plaintiff, George Henry Gadd, of Marlborough Avenue, Bromsgrove, architect and surveyor, of the other part, the defendant bound himself apprentice to the plaintiff for the term of four years. The deed provided for the payment of a premium by the father of 25*l.* and contained the usual covenants by the apprentice to serve and by the master to instruct. It also contained a joint and several covenant by the defendant and his father that the defendant should not "at any time within ten years from the expiration of the above-mentioned term within a radius of ten miles from the Bromsgrove Town Hall carry on or practise either by himself or in conjunction with any other person or persons and either as principal, clerk, or assistant the profession of an architect or surveyor." At the date of the deed the defendant was an infant

1910

GADD v. THOMPSON.

of between fourteen and fifteen years of age. The term of the apprenticeship expired on May 7, 1906, and the defendant came of age on December 9, 1908. In August, 1909, the defendant committed a breach of the above-mentioned covenant. The action was brought for an injunction to restrain the defendant from committing further breaches of the covenant. It was contended for the defendant that, the deed being one of apprenticeship, and the defendant having been an infant at the time when he executed it, he could not be sued upon the covenant. Evidence was given by the plaintiff and the only other person practising as an architect in the town of Bromsgrove that they would not accept an apprentice except upon the terms of his entering into a restrictive covenant similar to that contained in the defendant's deed. The county court judge held (1.) that the rule that an infant apprentice could not be sued upon the covenants in the apprenticeship deed did not apply to a covenant fixing the relations of the parties after the apprenticeship had come to an end; (2.) that the covenant was fair and reasonable, and that the deed was for the benefit of the apprentice. He accordingly granted the injunction asked for. The defendant appealed.

R. A. Willes, for the defendant. No action will lie on the covenants in an apprenticeship deed against the apprentice himself, if he was an infant at the date of the deed. It has long been settled that it will not lie on the positive covenant to serve: *Gylbert* v. *Fletcher* (1); *Farnham* v. *Atkins* (2); nor can a negative covenant be enforced against him by injunction: *De Francesco* v. *Barnum*. (3) It is true that in *Walter* v. *Everard* (4), where an apprentice, who was an infant at the date of the deed, covenanted to pay the balance of the premium at a fixed future date, it was held that on the arrival of that date the master might recover the premium, upon the ground that the liability of the infant for necessary instruction stood upon the same footing as that for ordinary necessaries. The Court, however, held the master entitled to recover, not on the covenant, but merely for the reasonable price of the instruction. They held

(1) (1629) Cro. Car. 179.
(2) (1682) 1 Sid. 446.
(3) (1889) 43 Ch. D. 165.
(4) [1891] 2 Q. B. 369.

1910

GADD v. THOMPSON.

that he was not the less liable to pay for the price of necessaries because he had covenanted to pay it. They treated the deed as non-existent, Lord Esher saying that "The Court must do exactly what it would do if there were no deed." And Lopes L.J. expressly repudiated the notion that their decision in any way conflicted with such cases as *Gylbert* v. *Fletcher*. (1) Here the plaintiff is not seeking to recover the reasonable price of the instruction given, but to enforce a special covenant, and that he cannot do. The only remedy upon the covenants in the deed is against the father. It is because the apprentice cannot be sued that the father is made a party to the deed.

Milward, for the plaintiff. The judge was right in holding that the deed was for the benefit of the defendant and that the covenant sued upon was reasonable. The plaintiff would never have taken the defendant as his apprentice but for the covenant. It was the gist of the whole bargain. Nor could the defendant have got instruction elsewhere except upon the terms of such a covenant. In *Bromley* v. *Smith* (2) Channell J. said: "There is abundant authority that contracts of service may be binding on infants although they contain restrictive terms. A contract which contains the only terms on which an infant can reasonably expect to get employment must, I think, be for his benefit." Apart then from the fact that the deed in which it was contained was an apprenticeship deed, as distinguished from an ordinary contract of service, the covenant here was valid and enforceable against the defendant. But it makes no difference that it was an apprenticeship deed. The old cases in which it was held that breach of covenant would not lie against an apprentice upon his indentures have no application to the present. In those cases the attempt to enforce the covenant was made during the currency of the apprenticeship and while the defendant was still an infant; and in *Walter* v. *Everard* (3) Fry L.J. suggested (4) that the decision in those cases was "founded upon two facts: first that by the common law a master had a considerable power of correcting and castigating his apprentice; second, that by a very early statute jurisdiction

(1) Cro. Car. 179.
(2) [1909] 2 K. B. 235, at p. 242.
(3) [1891] 2 Q. B. 369.
(4) Ibid. at p. 376.

1910

GADD v. THOMPSON.

was given to justices to enforce the performance of the contract of an infant apprentice to serve his master. Perhaps it was thought unnecessary to enforce the performance of the contract in any other way." It is obvious that those two remedies could only exist so long as the defendant was both an apprentice and a minor. Here both apprenticeship and minority had come to an end before action brought and before breach. The reason, therefore, of the old cases does not apply. The case of *Walter* v. *Everard* (1) is in the plaintiff's favour. It decides that the apprentice may be sued for the price of instruction. Here part of the price was the covenant by the defendant not to practise in the neighbourhood, for without it the plaintiff would not have taken him as a pupil. Lord Esher did not mean that you must treat the deed as if it was torn up and refuse to look at its terms.

Willes in reply. *Walter* v. *Everard* (1) decides nothing more than that instruction is a necessary for an infant, and that after the infant has come of age he may be sued for the price of such a necessary supplied to him during infancy. But price in that sense means the money value and nothing else; it does not include such a covenant as that here sued upon.

PHILLIMORE J. This is an action brought against a young man upon a covenant entered into by him in an apprenticeship deed. At the date of the deed he was between fourteen and fifteen years of age, and the apprenticeship was to last for four years, so that at the time when it expired he would still be an infant. The deed contained the usual covenants and provided for the payment by the apprentice's father of a small premium. There was also a covenant by the apprentice not to practise in his master's profession within a certain radius for a certain number of years after the apprenticeship had ceased. The apprentice served his time, and subsequently, both before and after he came of age, he practised as an architect within the prohibited radius. It is admitted that he committed breaches of the covenant sufficient to support the order for an injunction if the covenant was valid and enforceable. The county court judge was of opinion that it was valid and enforceable. Now it

(1) [1891] 2 Q. B. 369.

1910

GADD v. THOMPSON.

Phillimore J.

is clear upon the authorities that for reasons which are somewhat out of date, but which still hold good in cases to which they apply, no action can be brought against an apprentice while he is an apprentice upon the covenants in the apprenticeship deed. But that rule, in my opinion, only applies to actions brought during the apprenticeship. No doubt in the majority of cases the covenants in the deed are confined to something to be done during the continuance of the apprenticeship, and it was with covenants of that class that the old cases such as *Gylbert* v. *Fletcher* (1) were dealing. But a contract of apprenticeship may be entered into in which the inducement to the master may be an undertaking by the apprentice to do something at a future date after the apprenticeship shall have ceased. In *Walter* v. *Everard* (2) the action was brought upon a covenant by the apprentice, who was an infant at the date of the deed, for payment of the balance of the premium three and a half years after that date. The apprenticeship was for four years, so that the money became due at a time when the apprenticeship was still running. It was held that the defendant was liable upon the ground that the instruction which was the consideration for the payment was in the nature of necessaries. But if the infant apprentice may bind himself to pay the price of the instruction at a future date during the apprenticeship, he may equally bind himself to pay the price at a later date when both apprenticeship and infancy have come to an end. That price need not necessarily be payable in money. I can see no reason why he should not bind himself by covenant to do any other act after the apprenticeship is over which the master may be willing to accept as deferred consideration for the instruction to be given, as, for instance, to attend for a certain period at the master's office and assist him in the drawing of designs or specifications, or why such a covenant should not be enforceable. It is only going one step further to say that a negative covenant to abstain from doing something after the apprenticeship is over, such as a covenant not to betray his master's secrets or to carry on business in the neighbourhood, may be enforced. I think that there is no objection to

(1) Cro. Car. 179. (2) [1891] 2 Q. B. 369.

1910

GADD v. THOMPSON.

Phillimore J.

such a covenant. The old cases do not touch this point. They only decide that the master cannot sue the apprentice on his covenant whilst he is still an apprentice. I think, therefore, that such a covenant as this can be enforced, and that there is no reason for drawing any distinction in this respect between a contract of service and a contract of apprenticeship, and that if an infant in order to enable him to get employment as a servant can bind himself not to practise within a certain district after the termination of his service, so also may an infant apprentice bind himself not to practise within a certain district after the termination of his apprenticeship. I agree that such a covenant as this, in order that it may be enforceable, must be reasonable. Then what are the facts as to the circumstances in which it was entered into? The town where the plaintiff practised was a small one, and there were only two architects there. Both of them stated in their evidence that they would not take an apprentice except upon the terms of his entering into a similar restrictive covenant. That was their price, or part of their price, for the instruction to be given by them. And I quite agree with what was said by Channell J. in *Bromley* v. *Smith* (1) as to the reasonableness of such a price when the teaching cannot be got on any other terms. I think the judgment of the county court judge was right and that the appeal must be dismissed.

LORD COLERIDGE J. The question is whether an apprentice who was an infant at the date of the apprenticeship deed can be bound by a restrictive covenant in the deed after the apprenticeship has expired. No doubt, as a general rule, an infant apprentice can avoid the deed on his reaching full age, but he cannot do so in every case. Where the instruction has been given in consideration of covenants entered into by him, he may in the case of certain covenants continue to be bound by them after he has attained full age, such as a covenant to pay the balance of the premium upon the falling in of a reversionary interest, as in *Walter* v. *Everard*. (2) An apprenticeship deed is partly for the benefit of the master and partly of the apprentice. Here the latter could not have obtained the benefit of the

(1) [1909] 2 K. B. 235, at p. 242.

(2) [1891] 2 Q. B. 369.

1910

GADD v. THOMPSON.

Lord Coleridge J.

apprenticeship without entering into this restrictive covenant. The question is whether the restrictive covenant may not be taken to be part of the premium or price of the teaching, and as such enforced in the same way as the agreement to pay a pecuniary premium was enforced in the case referred to. I think it may. A further question is whether the restriction is reasonable. In *Bromley* v. *Smith* (1) Channell J. said: "There is abundant authority that contracts of service may be binding on infants although they contain restrictive terms. A contract which contains the only terms on which an infant can reasonably expect to get employment must, I think, be for his benefit." That is precisely the case here. And what is reasonable in a contract of service must equally be reasonable in an apprenticeship deed. I think the county court judge was right in holding the covenant sued on to have been for the apprentice's benefit, and that the order for an injunction was properly made.

Appeal dismissed.

Solicitor for defendant: *S. Roberts, Bromsgrove.*
Solicitor for plaintiff: *J. Horton, Bromsgrove.*

(1) [1909] 2 K. B. 235, at p. 242.

J. F. C.

HAYLETT *v.* THOMPSON.

1910
Oct. 25.

Ship—Seaman's Articles—Agreement for a Voyage—End of Voyage.

A seaman signed articles "for a voyage not exceeding two years' duration . . . . to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master":—

Held that, although under such articles the voyage may come to an end without any express election by the master, and although, if the voyage has in fact so come to an end, the master cannot prolong its continuance by requiring the seaman to go on to a further port, the mere facts that the ship has discharged her cargo, that she has arrived in a home port, and that she has there taken on board bunker coal required for a future voyage do not conclusively shew that the voyage has so terminated.

Case stated by justices of South Shields.

A complaint was preferred by the respondent under s. 164 of the Merchant Shipping Act, 1894, against the appellant, the master of the ship *Sarstoon*, for refusing to pay to the respondent the sum of 8*l.* 8*s.* 5*d.*, being wages earned by and due to him on April 4, 1910, as a seaman engaged on board the said ship. The complaint was heard on April 5, and the justices ordered the appellant to pay to the respondent the amount claimed.

Upon the hearing of the complaint the following facts were proved or admitted:—

On January 6, 1910, the respondent, Peter Thompson, signed articles to serve as an able seaman on board the s.s. *Sarstoon* "for a voyage not exceeding two years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude commencing at London proceeding thence to Barbados via Dartmouth and/or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master." The rate of wages to be paid to the respondent for his services on board the said vessel was to be 4*l.* per month.

The *Sarstoon* sailed from London on January 9, 1910, laden

1910

HAYLETT v. THOMPSON.

with a general cargo, and proceeded to the West India Islands, calling at Barbados, Trinidad, and Demerara, and ultimately to St. Kitts. From there she proceeded with a general cargo to Havre, where part of the cargo was discharged, then to London, where a further part of the cargo was discharged, and where some stores for the next foreign voyage were taken on board, and thence to Rotterdam, where the remainder of the cargo was discharged. Rotterdam is a port within the home trade limits. The vessel then came to the Tyne Dock, on the river Tyne, where she arrived on April 3, 1910. She had at that time between 100 and 200 tons of bunker coal on board, which in the justices' opinion was sufficient to take her from the Tyne to Glasgow. The daily consumption of coal on board the vessel was between twenty-five and twenty-six tons. On the arrival of the *Sarstoon* at London before she proceeded to Rotterdam the respondent applied to the chief officer to be discharged and paid off, but he was told that he would have to proceed to Rotterdam, as the whole of the cargo was not to be discharged at London. When she arrived in the Tyne he again applied to the appellant to be discharged and paid off, but the appellant declined to discharge him on the ground that the voyage was not completed, although he did not at that time tell the respondent where the vessel was to proceed after leaving the Tyne. While in the Tyne the vessel took on board 1300 tons of bunker coal. It was not until the hearing of the complaint on April 5 that the appellant intimated that the vessel was to proceed to Glasgow. It was admitted that the amount claimed by the respondent had been earned by him.

On the part of the appellant it was contended that the respondent was not entitled to his discharge on the ground that the Tyne was not the port at which the voyage was to end, as the appellant had not so required it. The justices were of opinion that the voyage ended at the port of the Tyne, and in coming to this conclusion they carefully considered the opinions of the Lords in the case of *Board of Trade* v. *Baxter*. (1) Lord Loreburn L.C. in delivering judgment in that case said: "It is true that the master may choose at what port in the

(1) [1907] A. C. 373.

United Kingdom or within home trade limits the voyage is to end, but that does not mean that he can prevent a voyage from ending when in fact it has ended. It means that he is the person who has to fix upon the port where the voyage is to end, but if he fixes upon a port where in fact the voyage does end, although he may not intend that the voyage shall end there the voyage is none the less ended at that port." The justices thought that those words directly applied to this case in view of the fact that whilst in the Tyne, although there were between 100 and 200 tons of bunker coal on board, a further supply of 1300 tons was shipped. That, in their opinion, indicated that the voyage was ended and a new voyage begun.

Atkin, K.C., *Lewis Noad*, and *Raeburn*, for the appellant. The mere fact that a ship after discharging her cargo has taken in bunker coal intended to be used on a future voyage is not conclusive evidence of the termination of the voyage, as the justices seem to have thought. Prima facie the voyage is to end where the master requires, and in the absence of such requirement it is only something which is wholly inconsistent with the continuance of the voyage that can cause it to end, such as the acceptance of a charter for a fresh voyage to commence at the port where it is contended that the old voyage has ended. This is what Lord Loreburn meant when he said in *Board of Trade* v. *Baxter* (1) that the master's power to choose the port of termination " does not mean that he can prevent a voyage from ending when in fact it has ended." Bunkering in contemplation of a new voyage is not inconsistent with the continuance of the old one. A ship in the course of her voyage with cargo on board may, if she happens to call at a port where coal is cheap, lawfully take bunker coal on board in view of her next voyage. If so it can make no difference that at the time of taking the coal on board she had discharged her cargo; for *Board of Trade* v. *Baxter* (1) expressly decides that the fact of a ship having discharged her cargo and being in a home port does not of itself shew that the voyage has ended, for, as was there pointed out, the voyage is the voyage of the ship and not of the cargo.

(1) [1907] A. C. 373.

1910

HAYLETT v. THOMPSON.

Abinger, for the respondent. If the question whether the voyage had ended is a question of fact, then, upon the evidence that the ship, being empty and in a home port, had bunkered for her next voyage, the justices found as a fact that the voyage was at an end.

[PICKFORD J. What I think the justices meant was that upon that evidence they felt themselves bound as matter of law to so hold.]

Assuming that to have been their meaning they were right in the view which they took. Any other view would enable the master after discharging the cargo in a home port to take in a fresh cargo and carry it to another port without bringing the original voyage to an end. And that is just what Lord Atkinson in *Board of Trade* v. *Baxter* (1), where the articles were identical with those in the present case, said he could not do: "I think it would not have been permissible for the master of the ship, under articles such as these, to have left a home port, to have traded from a foreign port to a foreign port, to have returned to a home port and there discharged his cargo, and started afresh upon a new voyage to some other foreign port." If he could not do so to another foreign port, neither can he do so to another home port. Taking the coal on board to be used on a future voyage was conclusive evidence that the voyage was at an end.

Atkin, K.C., in reply.

DARLING J. In this case I think the appeal should succeed. The respondent signed articles for a voyage not to exceed two years. The ship went to various ports outside the United Kingdom and came back to London, where she got rid of part of her cargo, proceeding thence to Rotterdam, where she discharged the rest. From there she came to the Tyne, and the master did not require that the voyage should finish there, so that so far there was nothing to shew that the voyage was not continuing. Under such articles as these the natural way to terminate the voyage was for the master to require that it should terminate. But the master here did nothing of the kind. Being in the Tyne and intending to go on to Glasgow, he took on board a quantity of

(1) [1907] A. C. 373.

1910

HAYLETT v. THOMPSON.

Darling J.

bunker coal. Thereupon the justices, having considered the case of *Board of Trade* v. *Baxter* (1), and particularly what was said by Lord Loreburn, proceeded to apply what was there said to the facts of this case, and came to the conclusion that although the master had not required the voyage to end, yet merely because he had taken in 1300 tons of coal, which was not necessary to take the ship to Glasgow, he had in fact terminated the voyage. I should have said myself that that fact was not even evidence that the voyage was terminated. I should have said that it pointed to one of two things—either that the master, finding himself in a place where coals were plentiful, and having in contemplation a fresh voyage to commence after his arrival in Glasgow, took on board the coals in the Tyne because he could get them there cheaper than he could in Glasgow, in which case there was nothing unreasonable in his making preparations for the next voyage during the continuance of the existing one; or that he contemplated extending the existing voyage beyond Glasgow and consequently took on board the coals in the Tyne for the purpose of meeting the requirements of the existing voyage. In either view the mere fact of bunkering the ship in the Tyne could not operate as a termination of the voyage specified in the respondent's articles.

PICKFORD J. I agree. If the justices had found as a fact that the voyage had come to an end in the Tyne I do not think we could have said that the voyage did not end there. But I do not think that that was what they intended. According to the articles the respondent was to serve for a certain voyage, defined in its duration and its geographical limits, to end at such port in the United Kingdom or Continent of Europe within home trade limits as might be required by the master. Therefore the first thing to consider is where did the master require this voyage to end? The vessel had gone to several ports and had discharged the last of her cargo at Rotterdam. That the voyage does not necessarily end when the ship discharges her cargo is clear. It was expressly so decided by the House of Lords in *Board of Trade* v. *Baxter*. (1) Then having been cleared of her cargo the

(1) [1907] A. C. 373.

1910

HAYLETT v. THOMPSON.

Pickford J.

ship went to the Tyne, and I should have been better satisfied if we had had some statement in the case as to why she went to the Tyne, and as to the circumstances under which it was proposed that she should go on to Glasgow. All that we have stated is that she went to the Tyne, and that then the respondent applied for his discharge, and that the master refused to give it to him because the voyage was not ended and the ship was going further. Then being in the Tyne the ship took on board a quantity of bunker coal that was not required for the voyage to Glasgow, but would be required for a new voyage on which she was possibly to proceed from Glasgow. And on those facts the justices held that the voyage had come to an end in the Tyne. I was in doubt at first whether that was not a finding on a question of fact by which we were bound. But, as I have said, I think that what the justices meant was that they considered the fact of the ship taking in bunker coal for use upon a subsequent voyage was of itself sufficient to bring the preceding voyage to an end. In taking that view I think they were wrong. No doubt that fact would be one to be taken into consideration; but when the master requires the voyage to extend beyond the Tyne the mere fact that he takes in bunker coal for a future voyage, or even that he has gone to the Tyne for the purpose of taking in that coal for a future voyage, is not necessarily itself conclusive to shew that the voyage ended in the Tyne. I agree that the appeal should be allowed.

LORD COLERIDGE J. We are asked to hold as matter of law that because the ship took in coal in the Tyne far beyond the necessity of its voyage to the required port therefore ipso facto the voyage came to an end. I do not think that that is a correct view of the law.

Appeal allowed.

Solicitors for appellant: *Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for respondent: *Alex. Smith & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1910
Oct. 28.

In re BAGLEY.

Bankruptcy—Deed of Arrangement—Registration—Validity—Affidavit sworn before Solicitor to the Parties—Bankruptcy Notice—Bankruptcy of Judgment Creditor—Devolution of Title—Leave to Trustee in Bankruptcy to issue Execution—Garnishee Order—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6—*Commissioners for Oaths Act*, 1889 (52 & 53 *Vict. c.* 10), *s.* 1, *sub-ss.* 2, 3—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Rules of the Supreme Court, Order* XVII., *r.* 4; *Order* XXXVIII., *r.* 16; *Order* XLII., *r.* 23.

In May, 1909, G. recovered judgment against B. for 550*l*. In July, M. & W., who were judgment creditors of G. for a larger amount, obtained a garnishee order nisi on the judgment recovered by G. against B., and in January, 1910, the garnishee order was made absolute. In December, 1909, M. & W. served a bankruptcy notice on G. in respect of their judgment debt, and in February, 1910, a receiving order was made against him founded on his non-compliance with the bankruptcy notice. In May, 1910, G.'s trustee in bankruptcy assented to a deed of arrangement entered into between B. and his creditors in October, 1909. In June, 1910, having first obtained leave under Order XLII., r. 23, to issue execution on the judgment recovered by G. against B., he issued a bankruptcy notice against B. in respect of that judgment, and on his failure to comply with the notice presented a petition in bankruptcy against him. At the hearing it appeared that, although the deed of arrangement was in fact registered, one of the affidavits required by the Deeds of Arrangement Act, 1887, to be filed with the deed for the purposes of registration had been sworn before a commissioner for oaths who was solicitor to the trustee of the deed:—

Held—(1.) that the discharge of the garnishee order was not a condition precedent to the right of G.'s trustee in bankruptcy to issue a bankruptcy notice against B., inasmuch as the operation of the order was put an end to by the receiving order against G.

(2.) Applying *Baker* v. *Ambrose*, [1896] 2 Q. B. 372, that the deed of arrangement was void as it had not been registered in the manner provided by the Deeds of Arrangement Act, 1887, and that the assent of G.'s trustee in bankruptcy to the deed did not preclude him from issuing the bankruptcy notice.

(3.) Following the dictum of Cotton L.J. in *In re Woodall*, (1884) 13 Q. B. D. 479, and overruling the dictum of Wright J. in *In re Clements*, [1901] 1 K. B. 260, that it was not necessary for the trustee in bankruptcy before obtaining leave to issue execution on the judgment to be formally joined as a party to the proceedings under Order XVII., r. 4.

The disqualifying provision in sub-s. 3 of s. 1 of the Commissioners for Oaths Act, 1889, which prohibits a commissioner for oaths from exercising any of the powers given by the section "in any proceeding

C. A.
1910
BAGLEY, *In re.*

in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested," is not limited to proceedings in Court, but is co-extensive with the substantive provision in sub-s. 2, which empowers a commissioner for oaths to administer any oath or take any affidavit for the purposes of any Court or matter in England, including (inter alia) matters relating to the registration of any instrument.

APPEAL from a decision of one of the registrars in bankruptcy.

On May 11, 1909, R. J. Gibson recovered judgment in the King's Bench Division against the debtor M. S. Bagley for 550*l.* On June 21, 1909, Mappin & Webb recovered judgment in the King's Bench Division against Gibson for 657*l.* On July 20, 1909, they obtained a garnishee order nisi on the judgment recovered by Gibson against Bagley. On December 8, 1909, they served a bankruptcy notice on Gibson for 669*l.* 12*s.* 5*d.*, and on January 17, 1910, they presented a petition in bankruptcy against him founded on his non-compliance with the bankruptcy notice. On January 19, 1910, the garnishee order nisi was made absolute. On February 11, 1910, a receiving order was made against Gibson on Mappin & Webb's petition, they having stated in an affidavit filed on the hearing of the petition that they held no security for their debt, and adjudication followed.

In the meantime, namely, on October 14, 1909, Bagley executed an assignment of his property for the benefit of his creditors, and on October 21 the assignment was registered. Gibson did not assent to the deed, but on May 11, 1910, G. W. Chapman, the assistant official receiver, as trustee in Gibson's bankruptcy, assented to it. On May 21 Chapman, for value, assigned the judgment debt of 550*l.* to C. T. Nicholls, but no notice of the assignment was given to Bagley. On June 7, 1910, Chapman obtained ex parte under Order XLII., r. 23, an order for leave to issue execution on the judgment obtained against Bagley. The affidavit in support of the application stated that the plaintiff Gibson was adjudicated a bankrupt and that Chapman was his trustee in bankruptcy and was desirous of proceeding upon the judgment either by issuing execution or by issuing a bankruptcy notice against the defendant. On June 9 Chapman issued a bankruptcy notice against Bagley for the amount of the judgment debt and interest, and on June 21, on the failure of Bagley

to comply with the notice, Chapman and Nicholls presented a petition against him. The petition was opposed upon the ground that until the discharge of the garnishee order obtained by Mappin & Webb no bankruptcy notice could be served upon Bagley and also upon the ground that Chapman had assented to the assignment for the benefit of creditors.

By the Deeds of Arrangement Act, 1887, registration of a deed of arrangement is effected by filing a copy of the deed with the registrar together with an affidavit verifying the time of execution and an affidavit by the debtor.

At the hearing of the petition it appeared that the debtor's affidavit which was filed with the deed of arrangement was sworn before J. T. Goddard, a commissioner for oaths who was acting as solicitor to the trustee of the deed.

The learned registrar held, first, that the garnishee order ceased to have any effect after the receiving order was obtained against Gibson, and, secondly, that the deed of arrangement was void by reason of the affidavit which was filed with the deed having been sworn by a commissioner who by the terms of the Commissioners for Oaths Act, 1889, was incompetent to administer the oath, and that Chapman's assent to it, not knowing it was void, had no effect. He therefore made a receiving order.

Bagley appealed.

Atkin, K.C., and *Tindale Davis*, for the appellant. The first objection to this receiving order is that the official receiver was bound by his assent to the deed of arrangement. This deed was in fact registered in accordance with the Deeds of Arrangement Act, 1887 : see ss. 5, 6, 7, 8, 9, 14, and r. 5A of the rules under that Act ; and the affidavits required by s. 6 to be registered with the deed, namely, the affidavit of execution and the debtor's affidavit, were in the form given in the appendix to those rules. But it was said at the hearing of the petition that the registration was void because the commissioner for oaths before whom the debtor's affidavit was sworn was solicitor to the trustee of the deed, and that the affidavit did not comply with Order xxxviii., r. 16, of the Rules of the Supreme Court (which, it was contended, applied to affidavits under this Act) and was

C. A. 1910

BAGLEY, *In re.*

consequently insufficient, and *Baker* v. *Ambrose* (1) was relied on in support of that proposition. But, first, that was a decision under the Bills of Sale Act, 1878, and has no application to deeds of arrangement; secondly, it is inconsistent with the principle of *Vernon* v. *Cooke* (2) (which decided that an affidavit filed with a bill of sale is good though sworn before a solicitor acting for the parties) and ought to be overruled.

[FLETCHER MOULTON L.J. Rule 16 of Order XXXVIII. was not in existence when *Vernon* v. *Cooke* (2) was decided and I do not see how that case applies.]

Rules made under the powers of the Judicature Act ought not to be applied to the practice under the Deeds of Arrangement Act, which has separate rules and a separate rule committee of its own. The powers of the Judicature Act do not empower the committee to make rules except under that Act. Further, the use of the word "party" in r. 16 of Order XXXVIII. contemplates a proceeding in Court, and the introduction to the Rules shews that they are to apply to "proceedings." That language is inapplicable to the registration of a deed under the Deeds of Arrangement Act, which is not a proceeding at all. The same argument applies to the Commissioners for Oaths Act, 1889. By s. 1, sub-s. 2, a commissioner for oaths may take any affidavit for the purposes of any Court or matter, including matters relating to the registration of any instrument, subject to the proviso in sub-s. 3 that he shall not exercise the powers conferred by the section in any proceeding to which he is solicitor to any of the parties. There again the use of the words "proceeding" and "parties" points to proceedings in Court.

Even if the affidavit is not sufficient, the registration is good although some of the formalities have not been complied with: see per Lord Macnaghten in *Whiteman* v. *Sadler* (3), a decision under the Money-lenders Act.

[COZENS-HARDY M.R. That was a case where the name was placed on the register in conformity with the regulations.]

There, as here, there was a breach of the provisions of the

(1) [1896] 2 Q. B. 372. (2) (1880) 49 L. J. (Q.B.) 767.
(3) (1910) 26 Times L. R. 655.

Act. But assume that the deed was improperly registered and was therefore void under the statute as against people who were not parties to it, a creditor who has assented to the deed and has taken benefits under it is precluded from impeaching it on the ground of an irregularity of this description. Secondly, the garnishee order absolute operates as a stay of execution, and no bankruptcy notice could be served until the discharge of that order: *In re Connan.* (1) It is true that there is here an order for leave to issue execution, but that order was made ex parte upon an affidavit not disclosing the garnishee order and the proceedings were irregular. The trustee ought first to have applied to be made a party to the action under Order XVII., r. 4: *In re Clements.* (2) The debtor only knows that he has been ordered to pay somebody else, and the garnishee order ought to be properly and regularly set aside before any proceedings in bankruptcy can be taken against him.

Hansell and *Rankin*, for the respondents. It is not necessary that the trustee in Gibson's bankruptcy should formally get himself made a party to the action in addition to obtaining leave to issue execution. By the Bankruptcy Act, 1890, s. 1, any person for the time being entitled to enforce a final judgment shall be deemed to be a creditor who has obtained a final judgment within the meaning of s. 4 of the principal Act. Before that Act was passed it was held that the only person entitled to issue a bankruptcy notice was the judgment creditor or his legal personal representative, and in *In re Woodall* (3) Cotton L.J. said that it was not necessary that the legal personal representative should be joined as a party to the proceedings. The authority of the Court of Appeal is to be preferred to the dictum of Wright J. in *In re Clements* (2), which was not necessary to the decision of the case.

[FARWELL L.J. *In re Woodall* (4) is not a decision on the point.

COZENS-HARDY M.R. Lindley L.J. there says, referring to s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, "For all practical purposes, a person who has obtained leave to issue execution on the judgment is within the provision."]

(1) (1888) 20 Q. B. D. 690.
(2) [1901] 1 K. B. 260.
(3) 13 Q. B. D. 479, 483.
(4) 13 Q. B. D. 479.

C. A. 1910

BAGLEY, *In re.*

Under r. 4 of Order XVII. a person is only to be added as a party if "it becomes necessary or desirable," but it cannot be necessary or desirable where the Court has proof that the person asking for leave to issue execution is the person entitled. It is the purest technicality to say that the trustee should have been added. Further, it is too late to raise this objection after leave has been obtained. That order has not been appealed against and it stands until it is impeached. Then as to the garnishee order, by virtue of s. 45 of the Bankruptcy Act, 1883, its operation was put an end to by the receiving order of February 11. When the bankruptcy supervenes the garnishee order disappears: *In re Trehearne.* (1) There, as here, the attachment had not been completed by the receipt of the debt before the receiving order, and that is the ground of distinction between that case and *In re Connan.* (2) Moreover, Mappin & Webb are precluded from taking advantage of the garnishee order by the statement in their affidavit on the hearing of their petition that they held no security. Further, the deed of arrangement is a nullity, and if the registration is bad and the deed is void, the assent of the trustee in bankruptcy to that which is a nullity, not knowing it is a nullity, is nothing. The machinery for registering a deed of arrangement is the same as in the case of a bill of sale, and the effect of what was done here was that the debtor's affidavit which was filed with the deed was not an affidavit at all because taken before a person who was incompetent to administer the oath. It is said that "proceeding" in the proviso in sub-s. 3 of s. 1 of the Commissioners for Oaths Act, 1889, is limited to proceedings in Court. But "proceeding" is not a word of art which has a definition for all time and for all purposes, and the natural interpretation of this sub-s. 3 is to construe the proviso as being co-extensive with the substantive provision in sub-s. 2. Even assuming that the proceeding is to bear the limited meaning contended for by the appellant this is a proceeding in Court, because under the Deeds of Arrangement Act the registration is effected in the King's Bench Division and the affidavit is properly headed in that Division.

Tindale Davis in reply.

(1) (1890) 7 Morrell, 261. (2) 20 Q. B D. 690.

COZENS-HARDY M.R. This is an appeal from a decision of the registrar, who has made a receiving order against Mr. Bagley, and it raises a number of points of law. Some of the points at first struck me as serious and presenting real difficulty, but having listened to the full and able arguments of counsel I have come to the view that the decision of the learned registrar is right in all respects. [The Master of the Rolls stated the facts and observed that the effect of the receiving order against Gibson was that the garnishee order ceased to have any operation, first because Mappin & Webb deposed that they had no security and secondly by reason of s. 45 of the Bankruptcy Act, 1883, and he continued as follows:—]

The first objection taken by the debtor was that Chapman had assented to the deed of arrangement and therefore was not in a position to present a bankruptcy petition, nor was his assignee. The answer to that is that the deed of arrangement is a nullity, and for this reason. The Deeds of Arrangement Act, 1887, provides that a deed of arrangement shall be void unless registered under the Act, and the section which provides the mode of registration requires that there shall be registered with the deed two affidavits. Now one of those affidavits was sworn before Mr. Goddard, who was the solicitor for the trustee of the deed, and may also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the indorsement on the deed itself. That is the really important point in this case. Is an affidavit, or what purports to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void? I think there are several grounds on which we are bound to come to that conclusion. The solicitor was a commissioner to administer oaths, and the Commissioners for Oaths Act, 1889, s. 1, sub-s. 2, says this—I am reading it shortly: "A commissioner for oaths may by virtue of his commission administer any oath or take any affidavit for the purposes of any Court or matter in England including" amongst other things "matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise." It is quite clear that a solicitor who is a commissioner to administer oaths is by this sub-section

C. A. 1910

BAGLEY, *In re.*

Cozens-Hardy M.R.

expressly authorized to administer oaths in a matter relating to the registration of any instrument; but then there is this proviso in sub-s. 3: "Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested." That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding. It is said that "proceeding" there means a litigious proceeding or at least a proceeding in Court. I can see no ground for that contention. In my opinion, the word "proceeding" in sub-s. 3 is a compendious term applicable to all the various things mentioned in sub-s. 2. But even if it be not, is it not true to say that this is a proceeding in the King's Bench Division? The affidavit is headed in the King's Bench Division, and is properly so headed, because the registration is effected in the King's Bench Division; and, if it is necessary to consider it, I feel no doubt that under r. 16 of Order XXXVIII. the same objection applies as under the general language of the Act to this so-called affidavit, that it was sworn before a person who had no authority—that in fact it was a proceeding coram non judice. Then how does it differ from the case of an affidavit sworn before a man who is not a commissioner at all? If I am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor's affidavit is essential is no deed at all and is gone. I ought to say that in the view which I have taken of this matter I am simply following the decision of Wright J. in *Baker* v. *Ambrose* (1), which was decided fourteen years ago. That, it is true, was a case not under the Deeds of Arrangement Act, but under the Bills of Sale Act, but in my opinion it is impossible to draw any distinction for the present purpose between those two Acts.

Then it is said that Chapman was not a party to the action in

(1) [1896] 2 Q. B. 372.

which judgment was given against Bagley, and that in view of Gibson's bankruptcy he ought to have been made a party under Order XVII., r. 4, to which the answer is "No, he has obtained leave to issue execution under Order XLII., r. 23, and by so doing has brought himself precisely within the language of s. 1 of the Bankruptcy Act, 1890, and that is all that is required." In my opinion the answer to the objection must prevail. It suffices here to say that there is an order of the Court expressly and in terms giving Chapman the right to do that which the Bankruptcy Act, 1890, says entitles him to rank as a creditor within the meaning of s. 4 of the principal Act. It is enough for the purposes of this appeal to say that that order has not been impeached, and that on that ground alone the objection fails, because we could not go behind the order. But, speaking for myself, I prefer to adopt the view taken by Cotton L.J. in *In re Woodall* (1) rather than that taken by Wright J. in *In re Clements*. (2) In neither case were the observations which fell from the Bench necessary for the decision, and, being only dicta, I prefer the dictum of the Lord Justice to that of Wright J., and I think it was not necessary for Chapman before obtaining leave to issue execution to apply to be formally made a party to the action. I have now dealt with all the serious points which have been raised in argument. I think that there is no objection to the receiving order, that the decision of the registrar was right, and that this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I so entirely agree with the judgment which has just been delivered by the Master of the Rolls that I do not think I can usefully add anything.

FARWELL L.J. I agree. I desire to say that, as both my brethren agree with the view taken by Cotton L.J. in *In re Woodall* (1), I am not prepared to differ from them, although my personal feeling is rather in favour of the view taken by Wright J. in *In re Clements* (2), but I think it of great importance that there should be no doubt about the practice on

(1) 13 Q. B. D. 479, 483. (2) [1901] 1 K. B. 260, 263.

C. A. 1910

BAGLEY, *In re.*

Farwell L.J.

such a point. I also desire to say a word upon the construction of the Commissioners for Oaths Act, 1889. The Deeds of Arrangement Act, 1887, s. 5, enacts that "a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days" and so on, and s. 6 says that the registration shall be effected by filing a true copy of the deed with the registrar together with an affidavit verifying the time of execution and an affidavit by the debtor. To find out whether this deed was duly registered it is necessary to ascertain whether the affidavit was properly sworn before a commissioner for oaths who by s. 1, sub-s. 2, "may administer any oath or take any affidavit for the purposes of any Court or matter in England including . . . . matters relating to the registration of any instrument." It is obvious that the draftsman there intended to draw a contrast between matters in a Court of justice and matters outside a Court of justice. The Amendment Act of 1891 brings in affidavits made under a number of other Acts, such as the Merchant Shipping Acts. I feel no doubt that the disqualifying provision in sub-s. 3 of s. 1 of the Act of 1889 applies to all affidavits whether made in a litigious proceeding or otherwise, and the reasons for disqualifying a person who is acting as solicitor to any of the parties are equally applicable whether the matter is litigious or is not litigious. The result is that this affidavit, though sworn before a person who is a commissioner, is not an affidavit sworn before a person entitled to administer the oath or take the affidavit. I may add that in my opinion the recent decision of the House of Lords in *Whiteman* v. *Sadler* (1) has no bearing upon the case now before the Court.

Appeal dismissed.

Solicitors: *J. T. Goddard; Nicholls.*

(1) 26 Times L. R. 655.

H. B. H.

WILSON *v.* WILSON.

1910
Nov. 26.

Administration—Right of Retainer—Administrator undischarged Bankrupt.

An administrator who is an undischarged bankrupt has no right to retain, out of the assets received by him as administrator, a debt due to him from the deceased intestate.

Action tried before Channell J. without a jury.

The action was brought by Mrs. M. Wilson, widow of one H. C. Wilson, deceased, to recover from the defendant, Cyril Wilson, the sum of 394*l.* 18*s.* 1*d.* as money had and received by the defendant to the use of the plaintiff. The plaintiff claimed as administratrix of the estate of her late husband.

The material facts were as follows. The defendant was a brother of H. C. Wilson. In 1879 the defendant, who was then in a better position pecuniarily than his brother H. C. Wilson, rendered him financial assistance. At the trial the defendant produced an I. O. U. dated October, 1879, which shewed that H. C. Wilson then owed him 125*l.* There was on the I. O. U. an account shewing how it had been made up to that date, and that the defendant was still making payments on behalf of H. C. Wilson. The defendant also produced another account shewing further payments by him. The total payments made by the defendant for H. C. Wilson amounted to about 700*l.* The advances ceased in 1882, and at the time the present action was commenced had long been statute-barred. In November, 1899, the defendant became financially embarrassed, and a sum of 500*l.* was raised on a reversion belonging to his brother H. C. Wilson, of which sum the defendant had 400*l.* and H. C. Wilson the remaining 100*l.* Although H. C. Wilson might have treated the receipt of the 400*l.* by the defendant as a payment by him (H. C. Wilson) on account of the statute-barred debt owing by him, he did not do so; he treated it as a loan, and took a bill of sale over the defendant's furniture. The result was that that transaction could not be treated as having reduced the amount of H. C. Wilson's debt to the defendant or as having taken it out of the statute; the debt of 700*l.* was left as it was before, that is to say, it remained a debt, though it was statute-barred.

1910

WILSON v. WILSON.

In May, 1900, the defendant became bankrupt, and had not up to the time of the trial of the action obtained his discharge. On February 27, 1910, H. C. Wilson died in Egypt, intestate, and his property in Egypt was in the first instance collected and dealt with by the consul. The defendant then applied for letters of administration of H. C. Wilson's estate. H. C. Wilson had not seen or heard of his wife for more than twenty years before the date of his death. The defendant, for the purpose of obtaining letters of administration, swore an affidavit in which he stated that his brother had died intestate in Cairo, that he (H. C. Wilson) had not heard of his wife for twenty years before the date of his death, and that the defendant and two sisters were the next of kin. That affidavit was defective because the statements in it were consistent with the wife being still alive to the knowledge of the defendant. The defendant therefore swore another affidavit, omitting the reference to the separation of his brother from his wife, and stating that the brother had died intestate and a widower. On that affidavit the defendant obtained letters of administration on April 2, 1910.

The defendant gave evidence to the effect that at that time he knew nothing as to the existence of an administrator's right to retain a debt even though statute-barred, but that he was subsequently told by his solicitor that the right existed.

The value of H. C. Wilson's assets did not amount to 700*l.*, and the total assets received from time to time by the defendant as administrator of his estate amounted to the sum of 394*l.* 18*s.* 1*d.* The defendant claimed as administrator the right to retain his debt of 700*l.* (or so much of it as the assets would cover) out of the assets of H. C. Wilson. Accordingly out of the deceased's estate (after paying for the deceased's funeral and the costs of obtaining the letters of administration), he paid 136*l.* to his solicitor, who was a creditor of his, and 75*l.* to another creditor. On the following day the trustee in bankruptcy of the defendant intervened and claimed any rights that the defendant might have beneficially over his brother's estate. At that time the defendant had received out of the assets about 244*l.* 18*s.* 1*d.* The trustee did not then know anything about the statute-barred debt of 700*l.*, because, being statute-barred, the defendant had

not included it amongst his assets in the bankruptcy. When the trustee intervened nothing was paid to him by the defendant. The defendant subsequently received the balance of the estate from Egypt, amounting to about 150*l.*, and handed it to his solicitor. It was considered advisable to advertise for H. C. Wilson's widow, as the defendant desired, if possible, to learn beyond a doubt whether she were alive or dead. Accordingly advertisements were inserted in the *Daily Telegraph* and other newspapers, and on April 13, 1910, resulted in the widow communicating with the defendant's solicitors. On May 30, 1910, on a motion on her behalf, the President of the Probate Division recalled the letters of administration which had been granted to the defendant and granted administration to her.

On June 16, 1910, the writ in the present action was issued, whereby she claimed to recover the 394*l.* 18*s.* 1*d.* collected by the defendant whilst he was administrator of H. C. Wilson's estate. The claim was based upon the contention that the defendant being an undischarged bankrupt had no right in law as administrator to retain the 394*l.* 18*s.* 1*d.*, and that that sum therefore still remained part of the estate of the late H. C. Wilson to which the plaintiff as his administratrix was entitled.

A. H. Spokes, for the plaintiff. The defendant had no right as administrator to retain the debt. It is not disputed that the fact that a debt is statute-barred does not of itself prevent its being retained by an administrator. But in the present case the defendant had no right of retainer. He was an undischarged bankrupt, and s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), shews that the power to retain could only be exercised through his trustee in bankruptcy. Sect. 50, sub-s. 5, of the Bankruptcy Act, 1883, provides that things in action of the bankrupt shall be deemed to have been duly assigned to the trustee. The defendant's trustee in bankruptcy was therefore alone in the position to exercise any right of retainer. As he did not do so, the money was wrongfully retained by the defendant and forms part of the deceased's estate to which the plaintiff as his administratrix is entitled. [The definition of "property" in s. 168 of

1910

WILSON v. WILSON.

the Bankruptcy Act, 1883, and *In re Rownson* (1) were also referred to.]

Patrick Hastings, for the defendant. It is quite immaterial as between the plaintiff and defendant that the defendant was at the time he exercised his right of retainer and still is an undischarged bankrupt. Even if the right ought to have been exercised in the name of the defendant's trustee in bankruptcy, the only result would be that questions might arise between the trustee and the defendant. But by his appointment as administrator the defendant was enabled to do any act an administrator could properly do: *Boxall* v. *Boxall* (2); *Packman's Case.* (3) The revocation of a grant of letters of administration does not affect the validity of any act the administrator could properly do while the letters of administration by virtue of which he acted were in force. An administrator or executor is entitled to retain a debt due from the deceased if he has a beneficial interest in the debt: *In re Richards.* (4) It is clear that an administrator can retain a debt which is statute-barred: *Stahlschmidt* v. *Lett.* (5) The defendant has done everything necessary to exercise his right of retainer: *Burge* v. *Brutton.* (6) A cestui que trust may retain: *Loomes* v. *Stotherd* (7); *Marriott* v. *Thompson.* (8)

CHANNELL J., after stating the facts, continued:—It is said, and there is authority for the proposition, and it is also in accordance with common sense, that the defendant's acts as administrator during the time he was administrator are valid. Whether acts done in his own favour by exercising his right of retainer in cases where that right exists are equally valid may be a matter of some doubt, but I am not sure that they would not be valid, and it is unnecessary for me to give any decision on the point. In *In re Rownson* (1) it was said that the origin of the right of retainer is that, as an administrator cannot sue himself, and inasmuch as any other creditor is entitled to issue a writ at once and obtain judgment against the administrator, and thereby get

(1) (1885) 29 Ch. D. 358.
(2) (1884) 27 Ch. D. 220.
(3) (1595) 6 Rep. 18b.
(4) [1901] 2 Ch. 399.
(5) (1853) 1 Sm. & G. 415.
(6) (1843) 2 Hare, 373.
(7) (1823) 1 S. & S. 458.
(8) (1739) Willes, 186.

preference, it would be a hardship on the administrator if h could not retain his own debt, but that it is an anomalous right and ought not to be extended; it was also pointed out that a statute-barred debt is still a debt, for the Statute of Limitations does not destroy the debt, but only the remedy.

The question is what in the circumstances is the effect of the defendant's bankruptcy? I had some doubt at first whether the payment by the defendant to his creditors was an election by him to retain the debt due to him from the deceased, but *Ex parte Gilbert* (1) and *In re Rhoades* (2) shew that what was done by the defendant was a sufficient election by him to exercise his right of retainer if he had that right. He was a bankrupt, and although he had not disclosed this debt as an asset, it is clear that the beneficial right to the debt was in the trustee in bankruptcy, and the trustee was the proper person to sue for it; and therefore the reason given for the right of retainer, namely, that an administrator cannot sue himself, does not exist in this case. The trustee was the only person who could have sued H. C. Wilson, and if he had done so H. C. Wilson could have elected to pay although the debt was statute-barred. It seems to me that, on principle, and looking at the real nature of the right of retainer, the fact that the trustee in bankruptcy, and not the defendant, was the person who could have sued for this debt prevents the defendant from having had a right of retainer. It is said on behalf of the defendant that although the administrator may not be the person entitled to sue, yet if he is the person beneficially entitled to the debt he may still exercise the right of retainer. There is old authority to that effect, but the more recent cases of *In re Dunning* (3) and *In re Hayward* (4) shew that, even if the old authorities still hold good, they do not apply unless the administrator is solely entitled beneficially to the whole interest in the debt, and that they do not apply to a case where some one other than the administrator is entitled to sue, and the administrator is not entitled to the whole interest in the debt. Now the defendant undoubtedly had some interest in this debt, because he had an interest in seeing

(1) [1898] 1 Q. B. 282.
(2) [1899] 2 Q. B. 347.
(3) (1885) 54 L. J. (Ch.) 900.
(4) [1901] 1 Ch. 221.

1910

WILSON v. WILSON.

Channell J.

his creditors paid and he would be entitled to any balance that might remain after they were paid; but the defendant had not an interest in the entire fund, and the case seems to me to come exactly within the principle of *In re Hayward* (1) as a case in which the defendant had some interest but not the entire beneficial interest in the debt.

The result is that the defendant had no right of retainer, and he is therefore accountable for the money which he has received, and there must be judgment for the plaintiff for the amount claimed.

Judgment for plaintiff.

Solicitors for plaintiff: *Biddle, Thorn, Welsford & Sidgwick.*
Solicitors for defendant: *Ramskill & Co.*

J. E. A.

1910

Dec. 6.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* McLEAN.

Criminal Law—Practice—Conviction on Indictment of one Offence—Admission by Prisoner of another Offence—Request by Prisoner to Court that in passing Sentence both Offences be dealt with—Principles upon which Court should act in deciding whether to comply with Prisoner's Request.

Where a Court before which a prisoner has been convicted on indictment of an offence is asked by the prisoner to deal with another offence which he admits having committed but for which he has not yet been tried, the Court may properly do so if the other offence is of the same character as the offence of which the prisoner has been found guilty, whether there has been a committal for the other offence or not. If there has been a committal for the other offence, the Court before dealing with it should ascertain that the prosecution consents. If the prosecution does not agree, the Court should not as a matter of course take the other offence into consideration. It may be that the prosecution desires for a sufficient reason that the other charge should be separately investigated.

If there is a committal in another county for an offence of a different character, the Court should not take the other offence into consideration without the consent of the authorities prosecuting the prisoner in respect of it, and even where the prosecution does consent the Court ought

(1) [1901] 1 Ch. 221.

1910

REX v. MCLEAN.

still to consider whether in the circumstances it ought to take that course, or whether the public interest requires a separate investigation.

The Court ought not to take another offence into consideration if it is not admitted by the prisoner.

The prisoner was indicted at the Berkshire Assizes on a charge of housebreaking, to which he pleaded guilty. Before sentence was passed he asked the judge to take into consideration a charge of arson which had been brought against him in Hertfordshire and in respect of which he had been committed for trial at the Hertfordshire Assizes, which had not then taken place, and to give him a sentence covering both offences. The judge accordingly took the charge of arson into consideration and passed a sentence of three years' penal servitude, no steps having been taken to ascertain the views of the Hertfordshire police authorities as to the desirability or otherwise of the two charges being dealt with at the same time. Subsequently the prisoner was indicted at the Hertfordshire Assizes before another judge on the charge of arson and pleaded guilty to the indictment. A sentence of five years' penal servitude was passed, it having been stated by the judge that the crime of arson had been very prevalent recently in Hertfordshire, and that the police authorities had therefore been unwilling that the charge of arson should be dealt with by the judge at the Berkshire Assizes at the same time as that of housebreaking. On appeal by the prisoner against the sentence of five years' penal servitude:—

Held, that the sentence ought to be reduced to one of three years' penal servitude to run from the date of the sentence inflicted on the prisoner at the Berkshire Assizes.

APPEAL by the prisoner Alexander McLean against his sentence.

On October 13, 1910, the prisoner was indicted at the Berkshire Assizes before A. T. Lawrence J. on a charge of housebreaking, to which he pleaded guilty. Before sentence was passed he asked the judge to take into consideration a charge of arson in respect of which he had been committed on September 6, 1910, at Watford, for trial at the Hertfordshire Assizes, which had not yet taken place, and to give him a sentence covering both offences. He was not formally asked whether he pleaded guilty to the charge of arson, nor were any of the circumstances connected with the latter crime stated to the Court; but the judge, acting upon the assumption that the prisoner admitted his guilt as to the charge of arson, took that charge into consideration as the prisoner desired it, and passed a sentence of three years' penal servitude, no steps having been taken to ascertain the views of the Hertfordshire police authorities

1910

REX v. MCLEAN.

as to the desirability or otherwise of the two charges being dealt with at the same time.

On November 7, 1910, the prisoner, notwithstanding what had taken place at the Berkshire Assizes, was indicted at the Hertfordshire Assizes before Grantham J. on the charge of arson, and pleaded guilty to the indictment. The circumstances in which the prisoner had been sentenced at the Berkshire Assizes were then mentioned to Grantham J. by counsel for the prosecution, who submitted that A. T. Lawrence J. had no jurisdiction to take into consideration the charge of arson.

Grantham J. passed a sentence of five years' penal servitude, and said that the Hertfordshire police authorities had been unwilling that the charge of arson should be dealt with in another county, where the appellant was being tried for an offence of a different character, namely, housebreaking, as the crime of arson had been very prevalent in Hertfordshire recently, and they therefore thought it desirable that the charge should be dealt with at the Hertfordshire Assizes.

The appellant appealed against the sentence of five years' penal servitude inflicted by Grantham J. for the arson on the ground that A. T. Lawrence J. had already punished him for that offence.

The *Appellant* in person.

J. Harvey Murphy, for the prosecution. A. T. Lawrence J. exceeded his jurisdiction in dealing at the Berkshire Assizes with an offence of a different character for which there had been a committal in a different county, namely, Hertfordshire, the consent of the police authorities in Hertfordshire not having been obtained. There has been a misunderstanding. It is desired that this Court should give some general direction as to the course which ought to be adopted at a trial where a prisoner asks the Court before which he is tried and convicted to take another offence with which he is charged into consideration in passing sentence. It does not appear that any clear rule can be deduced from *Rex* v. *Syres* (1), *Rex* v. *Taylor* (2), *Rex* v. *Greig* (3), and *Rex* v. *Higson*. (4)

(1) (1908) 1 Cr. App. Rep. 172.
(2) (1909) 2 Cr. App. Rep. 158.
(3) (1910) 4 Cr. App. Rep. 151.
(4) (1910) 5 Cr. App. Rep. 167.

[Lord Alverstone C.J. The head-note to *Rex* v. *Syres* (1) in the Criminal Appeal Reports is incorrect, although the judgment itself is correctly reported.]

1910

REX v. McLEAN.

The judgment of the Court (Lord Alverstone C.J., Pickford and Avory JJ.) was delivered by

Lord Alverstone C.J. Dealing in the first instance with this individual case, inasmuch as the prisoner admitted at the Berkshire Assizes that he was guilty of the offence of arson alleged against him in Hertfordshire and for which he was subsequently indicted at the Hertfordshire Assizes and asked A. T. Lawrence J. to take that charge into consideration in passing sentence for the offence of which he had then been convicted, namely, housebreaking, and inasmuch as A. T. Lawrence J. did take the offence into consideration, we think that in this particular case the prisoner should have the benefit of the state of things as it stood after he had been tried at the Berkshire Assizes, and that the sentence of five years' penal servitude passed by Grantham J. should be reduced to one of three years' penal servitude to run from October 13, when the prisoner was sentenced at the Berkshire Assizes.

Mr. Murphy has asked us to give an expression of opinion as to the way in which cases of this kind should be dealt with and as to the rule of practice which should prevail, and it is desirable that we should do so, as, although in the cases which have been cited decisions were arrived at which upon the facts of each particular case were correct, deductions have been drawn from those decisions as to a general rule of practice which are not satisfactory. No doubt it is desirable that a man who has been sentenced to a term of imprisonment should come out of prison with a clean sheet, for he is more likely in that case to get work and less likely to be subject to interference of an unauthorized character on the part of the police.

Dealing only with cases where the prisoner admits the charges against him, it often happens that although a committal has not been obtained for another offence the prisoner wishes to have the other offence taken into consideration. Where another

(1) 1 Cr. App. Rep. 172.

1910

REX v. MCLEAN.

offence is admitted and it is of the same character as that of which the prisoner has been convicted and in respect of which he is about to be sentenced, then, whether there is a committal in respect of that other offence or not, it is desirable that the judge should take both offences into consideration in passing sentence, even though the other offence has been committed in another county. If there is a committal for the other offence the judge should, before he decides to take the other offence into consideration, be satisfied that the prosecution consents and agrees that he should do so. In ordinary circumstances, if the prosecution does not agree, the judge should not as a matter of course take the other charge into consideration, but should consider whether he should do so. It may be that the prosecution for sufficient reasons desires that the other charge should be separately and publicly investigated.

If there is a committal in another county for another class of offence and the prosecution does not consent to that offence being dealt with at the same time as the one for which the prisoner has been convicted, the judge ought not to take the other offence into consideration. Even where the prosecution does consent, the judge ought still to consider whether in the circumstances he ought to take that course, or whether the public interest requires a separate investigation.

If the prisoner does not admit the other charge against him, in no case ought the Court to take it into consideration in passing sentence.

Taking this particular case as an example, it may well be that, when one of the charges is for arson and another for larceny, it is desirable that the charge of arson should be tried in the county where the crime is alleged to have been committed. It may be desirable, where it is said that there have been several charges of arson, each offence being alleged to have been committed in the county where the committal for arson has taken place, that there should be a separate investigation in that county of the charge of arson. Therefore, where there is a different charge in a different county, the judge should not take the other charge into consideration unless the prosecution consents and the public interest does not require that there should be a separate

investigation. We make these observations because it has been supposed that the decisions have laid down a different rule. The sentence of five years' penal servitude passed upon the prisoner will be reduced to one of three years' penal servitude to run from October 13, the date on which he was sentenced at the Berkshire Assizes.

1910

REX v. MCLEAN.

Sentence reduced.

Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A.

BURDEN *v.* RIGLER AND ANOTHER.

1910 *Dec.* 8.

Criminal Law—Lawful Public Meeting—Acting in Disorderly Manner for purpose of preventing Transaction of Business—Meeting held on Highway —Legality of—Public Meeting Act, 1908 (8 *Edw.* 7, *c.* 66).

The fact that a public meeting is held upon a highway does not necessarily make the meeting unlawful. Whether it is unlawful or not depends upon the circumstances in which it is held, e.g., whether or not an obstruction is caused.

CASE stated by justices of the borough of Poole.

An information was preferred by Henry Burden (the appellant) under the Public Meeting Act, 1908 (1), against William Charles Rigler and Henry Gibbs (the respondents) for that they "on June 20, 1910, at Longfleet, in the parish of Poole, then being persons at a lawful public meeting, did unlawfully act in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together."

(1) Public Meeting Act, 1908, s. 1, sub-s. 1: "Any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together shall be guilty of an offence and, if the offence is committed at a political meeting held in any parliamentary constituency between the date of the issue of a writ for the return of a member of Parliament for such constituency and the date at which a return to such writ is made, he shall be guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, and in any other case shall, on summary conviction, be liable to a fine not exceeding five pounds, or to imprisonment not exceeding one month."

1910

BURDEN v. RIGLER.

At the hearing before the justices the following facts were proved. The meeting on June 20, 1910, was a political one, held at 8 P.M., on the highway, opposite the Heckford Hall, which was used as a drill hall by the local company of the 4th Battalion of the Dorset Regiment (Territorials), situate in Kingston Road, Heckford Park, Longfleet, Poole, and was held in the East Dorset Parliamentary Division between the date of the issue of the writ for the return of a member of Parliament for the constituency and the date at which a return to the writ was made. The appellant had called together the meeting for the purpose of furthering the cause of tariff reform, he being the chairman of the local branch of the Tariff Reform League. The meeting had been billed, and notification of the same had been given to the police, who were present at the meeting. At the meeting the appellant attempted to speak, but there was such disturbance that the speech had to be discontinued; the respondents were standing quite close to the van from which the speakers were attempting to speak, and persistently interrupted and led the opposition; the appellant appealed several times to the respondent Rigler to desist from making such a disturbance and to try and induce his followers to permit the meeting to be held; the respondent Rigler said to the appellant, "You have set us at defiance, we will not allow you to hold a meeting"; and the meeting was broken up.

At this point, and before any other evidence was called, it was contended on the part of the respondents that inasmuch as the meeting was held on the highway it was not in itself a lawful meeting, and therefore could not be covered by the Public Meeting Act, 1908.

On the part of the appellant it was contended that the meeting being called together for a lawful purpose (i.e., to further the cause of tariff reform) was a "lawful public meeting" within the purview of the Public Meeting Act, 1908, and that the mere fact of its being held on the highway did not take it out of that Act, more especially having regard to the fact that the meeting had been publicly billed and advertised, and that the police had been notified and were present and raised no objection whatever to the meeting being so held on the ground of

obstruction or otherwise. The justices' attention was called by the respondents to *Reg.* v. *Graham and Burns* (1) and *Ex parte Lewis.* (2)

The justices dismissed the information on the ground that the meeting being held on the highway was not in itself a "lawful public meeting" within the purview of the Public Meeting Act, 1908.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Montague Shearman, K.C., and *Eustace Hills*, for the appellant. The fact that a public meeting is held on a highway does not necessarily make the meeting unlawful. There must be some interference with police regulations in order to make it unlawful. The justices held that no public meeting on a highway could be lawful. They misinterpreted the dicta in *Reg.* v. *Graham and Burns* (1) and *Ex parte Lewis.* (2) The meaning of those dicta is that there is no "right" to hold a public meeting on a highway, i.e., no absolute legal right, but it does not necessarily follow that if a meeting is held it may not be lawful. The dicta mean that the conveners of the meeting cannot in all circumstances insist on holding it. There is no limitation in the Public Meeting Act, 1908, as to where a political meeting may be held, and the statute implies that it is not unlawful in every case to hold a public meeting on a highway. [*Beatty* v. *Gillbanks* (3); the Seditious Meetings Act, 1817 (57 Geo. 3, c. 19), s. 23; the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 10; and the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4, were also referred to.]

The respondents did not appear.

Lord Alverstone C.J. In this case proceedings were taken in respect of interference with a meeting held on June 20, 1910, on a public highway. The evidence in support of the charge having been partly given, the justices declined to proceed further with the summons on the ground that the meeting, being held on

(1) (1888) 16 Cox, C. C. 420. (2) (1888) 21 Q. B. D. 191.
(3) (1882) 9 Q. B. D. 308.

1910

BURDEN v. RIDLER.

Lord Alverstone C.J.

a highway, was ipso facto an unlawful meeting. That ruling goes much too far. I express no opinion as to whether or not there was an obstruction; that depends upon the facts. The justices ought to entertain the summons, and if any point arises upon the evidence as to an obstruction or otherwise, it can be reserved, if necessary, for the consideration of this Court, but the justices had no right to assume that, simply because the meeting was held on a highway, it could be interrupted notwithstanding the provisions of the Public Meeting Act, 1908. The appeal must be allowed, and the case remitted to the justices to be further dealt with.

PICKFORD J. I am of the same opinion.

AVORY J. I agree.

Case remitted.

Solicitors for appellant: *Wyatt & Co., for Dickinson, Gwatkin & Manser, Poole.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 17;
Dec. 3.

HALL *v.* TAMWORTH COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Dependant—Partial Dependency—Basis of Assessment—Earnings—Deduction of Cost of Maintenance—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*) (ii.).

Upon an application under the Workmen's Compensation Act, 1906, by the father of a boy who died from the effects of an accident arising out of and in the course of his employment at the respondents' colliery, it appeared that the boy, who lived at his father's house, assisted his father in his trade of a barber, and that these services were of some money value to the father. The county court judge found that the wages earned by the boy at the colliery were not more than sufficient for the cost of his keep, and that he earned nothing else, and he therefore held that the father was not a partial dependant:—

Held (Farwell L.J. dissenting), that the Court was bound by *Osmond* v. *Campbell & Harrison, Ld.*, [1905] 2 K. B. 852, to hold that in cases of dependency, whether total or partial, the sum which it would have cost to maintain the deceased workman ought not to be taken into account, and that the case must go back to the county court judge to award such sum as he should consider reasonable and proportionate to the injury of the applicant.

Per Farwell L.J., and, *semble*, *per* Cozens-Hardy M.R. (Fletcher Moulton L.J. dissenting): The value of the boy's services to the father, not being earnings within the meaning of the Act, was properly excluded from consideration.

Appeal from an award of the judge of the Tamworth County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the father of a boy aged fourteen who died from the effects of an accident arising out of and in the course of his employment at the respondents' colliery. The deceased earned 6*s.* 11*d.* a week. He resided with his family, which consisted of his father, mother, and two sisters and a brother. Another brother was in the workhouse infirmary, a small weekly payment being made by the father for his maintenance there. The father drove the engines at the colliery in the daytime, earning an average wage of 16*s.* 9*d.* per week, which he supplemented by carrying on his trade as a barber on three evenings in the week and three-quarters of a day on Saturday. The deceased

C. A. 1910

HALL v. TAMWORTH COLLIERY COMPANY, LIMITED.

used to assist his father in his trade. He was able to lather, cut hair, and shave. The evidence of the father was to the effect that his services were worth about 6*s.* a week. Since his death the father had had to employ a boy at 2*s.* a week to assist him in his business, but this boy could only lather, and therefore his services were not so valuable as those of the deceased. The keep of the deceased came to about as much as his wages.

The county court judge found that the applicant was not a partial dependant, "for 6*s.* 11*d.* was not more than sufficient to maintain the boy," and he found that he earned nothing else. He therefore made an award in favour of the respondents.

The applicant appealed.

Hugo Young, K.C., and *H. H. Joy*, for the appellant. The judge was wrong in ignoring the profit derived from the barber's shop. It cannot be contended, having regard to the definition of "workman" in s. 13, that, quoad the father, the boy was a workman, or that the value of his services as barber can be treated as earnings, but that is not the question. It does not follow that those services are not to be taken into account. The boy was worth 6*s.* a week to the father, which was nearly as much as the cost of his keep, and if it is shewn that the boy was practically keeping himself from other sources, then the father can claim compensation in respect of the 6*s.* 11*d.* which the boy earned at the colliery. The sum to be awarded in the case of partial dependency must be reasonable and proportionate to the injury of the dependants: Sched. I., par. 1 (*a*) (ii.). Further, *Osmond* v. *Campbell & Harrison, Ld.* (1) shews that, whether the question is one of total or of partial dependency, the cost of the maintenance of the deceased workman is not to be taken into account. The matter must therefore be sent back to the county court judge.

C. A. Russell, K.C., and *E. W. Cave*, for the respondents. It is the constant practice to take into account the cost of the maintenance of the deceased, and *Osmond* v. *Campbell & Harrison, Ld.* (1) has never been regarded as an authority to the contrary. All that appeared there was that the county court

(1) [1905] 2 K. B. 852.

judge had awarded a sum which was not in excess of that allowed by the Act, and the observations of Collins M.R. are obiter only. The only decision was that the county court judge in arriving at a conclusion of fact had not misdirected himself. It did not appear how he had arrived at that conclusion, and it is well established that such cases are not to be decided upon any nice calculation. In that case no interpretation was put by the Court upon the words "proportionate to the injury." In *Main Colliery Co.* v. *Davies* (1) the method sanctioned by the House of Lords was a method of setting off against what the deceased brought in, the outgoings expended on his keep, and there is nothing in the decision in *Osmond's Case* (2) which says that it is contrary to law for the county court judge, in estimating the injury to the dependants, to take into account what has been saved as well as what has been lost.

[FARWELL L.J. referred to *Hodgson* v. *West Stanley Colliery.* (3)]

Then as to the value of the boy's services as barber, the county court judge was right in declining to take into account for any purpose the services rendered to a parent by a child living at home, because the Act defines dependants as members of the workman's family "wholly or in part dependent on the earnings of the workman." Earnings only are to be taken into account, and services are nowhere in this Act of Parliament referred to as equivalent to earnings. The benefit which has been taken away is the amount of the earnings, and the question is whether that has resulted in any injury. The county court judge having found that the whole of the earnings was counterbalanced by the cost of the boy's keep, he was entitled to find that there was no dependency or no injury, whichever way it may be put.

Hugo Young, K.C., in reply.

Cur. adv. vult.

Dec. 3. COZENS-HARDY M.R. This is an appeal by the father of a deceased workman who met with a fatal accident while in

(1) [1900] A. C. 358. (2) [1905] 2 K. B. 852.
(3) [1910] A. C. 229.

C. A. 1910

HALL v. TAMWORTH COLLIERY, COMPANY, LIMITED.

Cozens-Hardy M.R.

the employment of the respondents. The boy was fourteen years old. His wages were 6*s.* 11*d.* per week. These wages were paid to the father and helped to maintain the family. The learned county court judge made no award because he found that the applicant was not a dependant, or part dependant, "for 6*s.* 11*d.* was not more than sufficient to maintain the boy."

I think it is established by the decision of the House of Lords in *Main Colliery Co., Ld.* v. *Davies* (1) that the father in a case like this is partially dependent upon the boy's earnings. The only question is how we ought to apply the provisions of par. 1 (*a*) (ii.) of the First Schedule: "If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." I feel bound by the authority of this Court in *Osmond* v. *Campbell & Harrison, Ld.* (2) to hold that it is not legitimate to have regard to the amount which the maintenance of the deceased would have cost in a case of partial dependency. The judgments of the late Master of the Rolls and Mathew L.J. seem to me to be clear on this point, and although Romer L.J.'s language is not so precise, I do not find any indication of a difference of view. I think it would be frittering away the decision of the Court if I were to attempt to distinguish it on the facts. I take that decision to mean that neither in the case of total dependency, nor in the case of partial dependency, is the cost of maintenance to be deducted from the earnings, or the portion of the earnings, contributed by the deceased to the dependants. If my view is correct it is apparent from the judgment of the learned county court judge, in the passage which I have read, that he has misdirected himself on a point of law. The matter should, therefore, in my opinion go back to him to award such sum as he may consider reasonable and proportionate to the injury of the applicant.

In the view which I take it is not necessary to consider the value to the father of the boy's services in shaving the father's

(1) [1900] A. C. 358. (2) [1905] 2 K. B. 852.

customers. As at present advised I do not think they are earnings within the Act. The respondents should in my opinion pay the costs of the appeal.

FLETCHER MOULTON L.J. (after stating the facts as set out in the statement). The learned judge has found that the father, who was the applicant, was not in any way dependent upon the deceased at the date of his death, and accordingly has refused to award any compensation. In my opinion this decision is wrong.

It is clear from the evidence, and it is not contested by counsel for the respondents, that the boy's services must have been worth at least 2*s*. per week. I have no doubt that upon the evidence the county court judge must have found that they were worth more than this, but the actual figure is of no importance for the purposes of our decision, inasmuch as the point of law upon which the case turns would be raised equally if we assumed that they were only worth 2*s*. per week, as it is conceded they must have been. I will, therefore, take the lowest figure and assume that his services were worth only 2*s*. a week to the father.

There are two points to be decided in this case; first, whether the father comes within the definition of "dependant" under the Act, and, secondly, what is the principle on which compensation is to be assessed. The first determines the liability and the second the quantum.

The first point is concluded in favour of the applicant by the judgment of the House of Lords in *Main Colliery Co.* v. *Davies*. (1) Lord Halsbury there says in a similar case: "It is said that this boy was under no obligation to support his brothers and sisters. No one denies that; but it appears to be forgotten that the obligation is upon the head of the family. He is by law bound to support his family, and he would be punished by law if he did not support them. Therefore, the burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the

(1) [1900] A. C. 358.

C. A. 1910

HALL v. TAMWORTH COLLIERY COMPANY, LIMITED.

Fletcher Moulton L.J.

earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds supplied to him, or partly supplied to him, by the children who earn those funds." This judgment was concurred in by the other Lords and is thus unquestionable law, and it establishes to my mind beyond controversy that in this case the father was partially dependent upon the deceased at the time of his death.

But this does not settle the matter. We have now to turn to the First Schedule, par. 1 (*a*) (ii.), to ascertain the amount of compensation. If the amount ascertained in accordance therewith turns out to be zero, as the learned judge has found, it would in substance be the same as if the father was not dependent at all. The language of this part of Sched. I. is as follows: "If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." The case of *Osmond* v. *Campbell & Harrison, Ld.* (1) in this Court appears to me be an authority for saying that in a case of partial dependency the amount which the maintenance of the workman if alive would have cost ought not to be taken into consideration by way of reduction of the compensation. This case is, of course, binding upon us, and I accordingly hold that the learned county court judge was wrong in making any deduction from the contribution of the boy to the family fund in respect of the cost of his keep. But inasmuch as this case may go to a higher tribunal, and my personal opinion is that the judgment in *Osmond* v. *Campbell & Harrison, Ld.* (1) went too far, I propose to state what my decision would have been independently of that case. I do this the more willingly because to my mind the applicant here is entitled to compensation even if the decision in *Osmond* v. *Campbell & Harrison, Ld.* (1) should not be supported in its entirety.

(1) [1905] 2 K. B. 852.

By Sched. I., par. 1 (*a*) (ii.), the amount of compensation in a case of partial dependency is not to exceed the amount payable in case of total dependency, but there is no other limitation except that it must be reasonable and proportionate to the injury to the said dependants. The word "injury" has no special meaning in this context, and therefore it must mean injury in fact, that is, loss. Now in the present case the cost of the boy's living was 6*s*. 11*d*. per week. Against that he rendered services to his father as a barber worth, I assume, 2*s*. The total burden of the boy to his father was therefore 4*s*. 11*d*., and the wages he contributed to the family fund were 6*s*. 11*d*. Hence his father received help to the amount of 2*s*. per week from the boy's earnings, and the loss of this weekly sum represents the injury in fact caused to the father by his death. The sum, therefore, to which his father is entitled as compensation must be reasonable and proportionate to this injury, but must not exceed the amount which would have been awarded in a case of total dependency.

The learned county court judge has set off the 6*s*. 11*d*. wages against the 6*s*. 11*d*. total keep of the boy and has found that the injury is nothing. There is nothing whatever in the Act to oblige us to accept such a conclusion, which is obviously contrary to the truth of the case. In the schedule there is no specific direction to deduct the cost of the keep of the deceased workman in estimating the compensation, nor can any such intention be inferred from the use of the word "injury." At most this word might support an inference such as I have drawn above, namely, that from the wages contributed by the boy you must subtract the total burden that he would have been had he earned no wages in his employment. If the boy had been out of work so that his wages had stopped, the burden of the boy on his father would only have been 4*s*. 11*d*. and not 6*s*. 11*d*. Hence the contribution of the boy to the general fund was 2*s*. per week net.

It is suggested that in this mode of computing the injury the earnings of the boy by labour at home are treated as though they were earnings under the Act. This is not so. They are only regarded as lessening the magnitude of the

C. A. 1910

HALL v. TAMWORTH COLLIERY COMPANY, LIMITED.

Fletcher Moulton L.J.

burden which the boy actually is to the father. This they certainly do. For instance, if by some family arrangement a boy who contributes his wages to the family fund is continuously kept by his grandfather gratis, the actual loss to the family fund by his death is the whole amount of the wages that he contributes weekly because he himself causes no burden on that fund. The whole of his contributions without deduction go to assist his father to discharge his legal obligations to the rest of the family. The like result follows in a case like the present where the boy by means of his home work lessens the burden that he would otherwise be to the family fund. My decision involves no compensation for anything but the wages contributed by the boy, but the amount of injury in fact caused by the loss of that contribution may be, and in fact necessarily must be, affected by anything that lessens the burden on the family fund which would otherwise be caused by reason of the boy himself needing to be maintained.

For these reasons I am of opinion that the appeal must be allowed, and the case sent back to the learned judge to determine the compensation on proper lines, which are, of course, as the authorities stand, those laid down by this Court in the case of *Osmond* v. *Campbell & Harrison, Ld.* (1)

FARWELL L.J. In this case I have the misfortune to differ from both my brethren. There are two questions to be determined in cases of this sort. (1.) Is the claimant a dependant at all? (2.) If so, is he or she wholly or partly so dependent? Both are questions of fact: see *Hodgson* v. *West Stanley Colliery* (2), where Lord Loreburn L.C. says: "It is for the arbitrator or county court judge to ascertain, purely as a question of fact, who are dependent and to what extent, and what they are to receive, and how the compensation is to be distributed among the dependants, if there be more than one, in accordance with the directions of the Act. There is no room that I can see for legal presumptions." Lord Halsbury in the case of *Main Colliery Co.* v. *Davies* (3) says: "Now, my Lords, as to that question I do not

(1) [1905] 2 K. B. 852. (2) [1910] A. C. 229, 233.
(3) [1900] A. C. at p. 361.

think the Legislature ever intended that there should be any sharp definite line drawn, but that in each case the question must turn upon whether there is or is not what the Legislature has described as a condition of dependency as being the test whether or not a person is entitled to any compensation by reason of a death." I understand the House to have decided in the latter case that a father whose child does in fact contribute money towards the common fund out of which the family is maintained may be dependent on the earnings of such child, not that he must be so. I cannot think that a father who receives his boy's wages of, say, 3*s.* a week and expends 6*s.* a week in keeping him can, without doing violence to the English language, be said to be dependent on the earnings of such boy. In truth the boy depends on the father, although partially only, not the father on the boy. I doubt, however, if the point is of practical importance, because I think it is clear that in such a case he is, at any rate, only in part dependent under Sched. I., par. 1 (*a*) (ii.), and cannot have suffered any pecuniary loss or injury by losing 3*s.* a week and saving 6*s.*; but it appears to me that the proper course is first to determine the preliminary question of fact: Is there or is there not a state of dependency at all? In the present case the county court judge has found that 6*s.* 11*d.* was the wage earned and paid into the common fund by the boy and 6*s.* 11*d.* was the cost of his keep, and has held that the father was therefore not a dependant at all, and I am of opinion that he was right in so holding.

It was argued that *Osmond* v. *Campbell & Harrison, Ld.* (1) prevents the county court judge from taking into consideration the expense of maintaining the deceased out of the common fund. The decision in that case was only that the county court judge might in a proper case give the maximum amount allowed by the Act in a case of partial dependency; and it is only the decision that binds us. I cannot think that Lord Collins' words bear the construction that we are now urged to put upon them, for that is equivalent to striking the words "reasonable and proportionate to the injury to the dependants" out of the Act.

(1) [1905] 2 K. B. 852.

C. A. 1910

HALL v. TAMWORTH COLLIERY COMPANY, LIMITED.

Farwell L.J.

I understand that the uniform practice under the Act has been not so to read them.

But the case raises a further point. The boy assisted the father at odd times in shaving the father's customers. He was paid no wages for so doing, and the county court judge has held that the boy "earned nothing else" than the 6*s.* 11*d.* wages at the colliery. It is argued that this is so found by reason of a misdirection that the boy's value to his father could not be taken into account. I assume that the county court judge would have held that the boy's services were of some money value to the father, but he was of opinion that such value was not within the Act. I am of opinion that he was right. Dependants are defined as members of the workman's family wholly or in part dependent on the earnings of the workman. The compensation when the workman leaves any dependants in part dependent on his earnings is to be reasonable and proportionate to the injury to the said dependants, that is, injury by reason of the loss of his earnings. It cannot be that if a workman has a life income of 10*s.* a week the employer has to compensate his dependants for the loss of this annuity. The earnings, in my opinion, imply a contract of service. The whole scheme of the Act is based on earnings under a contract of service: see in particular Sched. I., par 2 (*b*), where provision is made for two concurrent contracts of service. In the present case there was no contract of service between father and son. The son may have been useful and in that sense valuable to his father, just as a daughter who works in a factory or with a dressmaker during the day may be useful and valuable in cooking the supper or making the beds; but this is not a loss within the contemplation of the Act. In my opinion the appeal fails and should be dismissed with costs.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Hughes & Masser, Coventry.*

Solicitors for respondents: *Ullithorne, Currey & Co., for Elliot Smith, Mansfield.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 14;
Dec. 3.

WARNER *v.* COUCHMAN.

Employer and Workman—Compensation—Accident arising out of the Employment — Frost-bite — Normal Risk — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A journeyman baker, whose right hand and arm had been injured by frost-bite while out on his rounds with his employer's cart on a cold day, claimed compensation for this injury as "an accident arising out of" his employment:—

Held (Fletcher Moulton L.J. dissenting), that, even assuming that there had been "an accident," there was no peculiar danger to which the applicant had been exposed beyond that which other drivers of vehicles or persons engaged in outdoor work on that day had experienced, and consequently that the accident had not arisen "out of" the employment.

Per Fletcher Moulton L.J.: When a workman sustains a physiological injury as the direct result of the work he is engaged upon and in the reasonable performance of his duties, he meets with "an injury by accident" within the meaning of the Act. If the employment brings with it more than ordinary exposure either to heat or cold, and injury results, that injury arises "out of" the employment.

Appeal against the refusal of the judge of the Tenterden County Court to award compensation to an applicant under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a journeyman baker whose right hand and arm had been injured by frost-bite while out on his rounds with his employer's cart could obtain compensation for that injury as "an accident arising out of" his employment.

On December 8, 1909, which was a very cold day with rain and sleet at intervals, the applicant's right hand became very cold and began to ache; the following day his hand and arm began to swell, and eventually he became unable to work, and applied for compensation under the Workmen's Compensation Act, 1906. The county court judge, who was assisted by a medical referee, found as a fact that the injury to the applicant's hand was caused by something in the nature of a frost-bite sustained by him while delivering bread on December 8, but

C. A. 1910

WARNER v. COUCHMAN.

added that there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day. With reference to one fact which was particularly relied on, namely, that the applicant had frequently to take off his right-hand glove in order to give change, the county court judge held that this, though probably convenient, was not necessary. For these reasons the county court judge refused to award compensation, though he settled the amount payable in the event of his decision being reversed. The applicant appealed. The appeal was heard on November 14, 1910.

Atkin, K.C., and *Graham Mould* (*L. G. H. Horton Smith* with them), for the appellant. This workman met with "an accident" within the meaning of that word as defined by this Court and the House of Lords in *Clover, Clayton & Co., Ld.* v. *Hughes.* (1) On this point the county court judge has given no formal finding. This injury to the hand was an unlooked for mishap which came to him while in his employment—*Ismay, Imrie & Co.* v. *Williamson* (2)—and was therefore an accident. *Morgan* v. *Owners of Steamship Zenaida* (3) is in our favour, and so too is *Sheerin* v. *Clayton & Co.* (4) From the nature of his work, the applicant was more susceptible to cold than ordinary workmen, and the fact that he had to take off his right-hand glove to give change exposed him to more than the ordinary risk; the case is within *Andrew* v. *Failsworth Industrial Society, Ld.* (5), and the county court judge ought to have found that the accident arose "out of" the employment. The true test is laid down in *Kelly* v. *Kerry County Council.* (6) Assuming it was "an accident," the county court judge has misdirected himself.

Hemmerde, K.C., and *Addington Willis*, for the respondent. The injury received by the applicant was not an accident within the meaning of the decisions. The county court judge expressly

(1) [1910] A. C. 242.
(2) [1908] A. C. 437.
(3) (1909) 25 Times L. R. 446.
(4) [1910] 2 I. R. 105.
(5) [1904] 2 K. B. 32.
(6) (1908) 42 I. L. T. 23; and Butterworth's W. C. C., vol. 1, 94.

finds that there was nothing in the nature of the employment which exposed the applicant to anything more than the ordinary risk of cold on that day. The county court judge has also in effect found as a question of fact that the injury did not arise "out of" the employment, or at any rate not sufficiently obviously out of the employment to enable him to award compensation. There is no evidence to shew that there was any abnormal cold on December 8, or that the applicant was exposed to anything more than any other drivers of vehicles were exposed to on that day.

Graham Mould in reply.

Cur. adv. vult.

Dec. 3. COZENS-HARDY M.R. This is an appeal by a workman whose claim to compensation has been disallowed by the county court judge.

The facts are simple and not really in dispute. [Having stated the facts, his Lordship continued :—]

In order to maintain his claim it is necessary for the applicant to prove that there was a personal injury by "accident" arising "out of" and in the course of the employment. That the injury was received in the course of the employment is clear, but it is contended that there was no accident, and that the injury did not arise out of the employment. I feel considerable doubt whether there was an accident within the meaning attributed to that word by this Court and by the House of Lords. But I assume this point in favour of the applicant.

It remains to consider the words "out of." If I may venture to quote my own words in *Craske* v. *Wigan* (1), where a cockchafer frightened a lady's maid sitting at an open window, with the result that her eye was injured, "it is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'" Can that be said in the present case? I am unable to see that there was any peculiar

(1) [1909] 2 K. B. 631, at p. 635.

C. A. 1910

WARNER v. COUCHMAN.

Cozens-Hardy M.R.

danger to which the applicant was exposed, beyond that to which that large section of population who are drivers of vehicles, or who are otherwise engaged as out-of-door labourers, are exposed.

The case of *Andrew* v. *Failsworth Industrial Society, Ld.* (1), upon which the appellant mainly relied, has, I think, been somewhat misunderstood. In that case it was found as a fact by the county court judge that the man, who was working on a scaffold at a considerable height, was exposed to more than the normal risk of being struck by lightning, and Lord Collins, then Master of the Rolls, said (2): "If there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment." And this Court declined to interfere with the award. On the other hand, the Court of Appeal in Ireland in *Kelly* v. *Kerry County Council* (3) held that a workman employed in a road who was killed by lightning was not entitled to compensation, on the ground that the accident did not arise out of his employment.

In the present case the county court judge says that there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day. He adds that one fact only was relied on, namely, that he had to take off his right-hand glove in order to give change, and that this, though probably convenient, was not necessary. In the face of this finding of fact, with which we cannot interfere, and which, so far as I can gather from the evidence, was perfectly correct, I think it is impossible for us to reverse the decision of the learned county court judge. In my opinion the appeal fails and should be dismissed with costs.

FLETCHER MOULTON L.J. The applicant in this case is a journeyman baker. Part of his duties was to go round to the

(1) [1904] 2 K. B. 32. (2) Ibid. at p. 35.
(3) 42 I. L. T. 23.

customers delivering bread from his master's cart, taking payment for the same and giving receipts. On December 8, while engaged in this occupation, his right hand became seriously affected. There can be no doubt that it was a direct consequence of exposure. The day was very cold, and in my opinion the facts of the case shew that it must have been exceptionally so. He was obliged continually to remove his glove from his right hand for the purpose of fulfilling his duties. The injury to the hand proved to be very serious, bringing on œdema of a persistent character and ending with wasting of the arm. The medical evidence leaves it clear that it was the consequence of the action of the extreme cold on the capillaries of the hand and the sheaths of the muscles. The county court judge, who was assisted by a medical referee, has held that "the injury to the applicant's hand was caused by something in the nature of a frost-bite sustained by him when delivering bread on the 8th of December," and not only is there evidence to support this finding, but I do not see how he could properly have found otherwise. The question was raised as to whether the injury was partly caused by a tendency to gout. The medical and other evidence does not support this suggestion, and there is no finding to that effect. But apart from this the question whether the man had or had not a tendency to gout is to my mind immaterial to the issue in this case, for there is no doubt that the cold was the immediate and proximate cause of the injury, and the decisions have established that in such a case the fact that there was an inherent weakness of constitution in the workman does not take away his right to compensation for the injury. The applicant is still unable to follow his avocation from the effects of the injury, and the county court judge has provisionally found the amount of compensation to which he is entitled if his claim should be held to be within the Act.

Two points have been raised on behalf of the respondents—first, that the injury was not "an accident" within the meaning of the Act, and, secondly, that it did not arise "out of" the employment. The learned county court judge decided against the applicant on the latter of these two points, but gave no formal decision on the other.

C. A. 1910

WARNER v. COUCHMAN.

Fletcher Moulton L.J.

In considering the question whether it was an accident within the meaning of the Act we are not confronted with the difficulty which was dealt with in this Court in the case of *Eke* v. *Hart-Dyke*. (1) The applicant here can indicate the day, time, circumstance, and place in which it occurred, so that it bears no similarity to an industrial disease. That being so, we are, in my opinion, concluded by authority. The dictum of Lord M'Laren in the Scotch case of *Stewart* v. *Wilsons and Clyde Coal Co.* (2) has more than once been approved of in the House of Lords. It is as follows: "If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, this is accidental injury in the sense of the statute." Every word of this dictum applies to the present case. The applicant undoubtedly sustained a physiological injury, which was the direct result of the work he was engaged in, and he sustained it in the reasonable performance of his duties, for the facts of the case do not justify any suggestion that he did not protect himself as well as he was practically able to do. But apart from this dictum, which is one of such authority as practically to bind this Court, the decided cases are, to my mind, conclusive on the point. I need only refer to the well-known case of *Morgan* v. *Owners of Steamship Zenaida* (3), where a man engaged in painting a ship in the tropics, who was thereby exposed to the heat of the sun to a greater extent than he otherwise would have been, and who died from the effects of a sunstroke, was held by this Court to have died from an accident within the meaning of the Act. I can see no distinction between the effects of heat and cold in a matter of this kind, provided that in both cases the excess of exposure is due to the circumstances of the employment.

There remains the question whether this accident arose out of the employment. I am obliged to confess, and I do it with all humility, that I cannot see that this admits of doubt. The man's employment required him to go his rounds on this bitterly cold day and deliver the bread to the customers and do all the acts

(1) [1910] 2 K. B. 677. (2) (1902) 5 F. 120.
(3) 25 Times L. R. 446.

necessary thereto. This involved exposure of the right hand, and it was this exposure which brought on the frost-bite. The severity of the cold to which he was thus compelled by his employment to expose himself is shewn by the nature of the injury, inasmuch as such injuries from cold are rare in this country, though common enough in northern or Continental climates, and it is obvious that but for the requirements of his employment he could have protected himself from such severe cold either by not going out on rounds such as he was required to make or by properly protecting his hand from the cold. The direct connection between the exposure necessitated by his employment and the injury is further shewn by the fact that it was only the hand so exposed that suffered. I confess that I cannot picture to myself a more typical case of an accident arising "out of" the employment.

The judgment of the learned judge of the county court shews that he thought himself permitted and even bound to compare the man's employment with other employments in order to ascertain whether the accident arose out of the applicant's employment. To my mind this is falsa demonstratio. The law does not say "arising out of his employment, and out of that employment only." Other employments have nothing whatever to do with the question. A shepherd who has to bring in his sheep in a snowstorm and suffers frost-bite or loses his life thereby is the victim of an accident arising out of his employment none the less because a railway guard or a night watchman or a postillion might be equally exposed to the weather. The comparison of one employment with another is to my mind wholly illegitimate.

It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise "out of the employment," because the man is not specially affected by the severity of the weather by reason of his employment.

The true issue could not be better expressed than it was by the

C. A. 1910

WARNER v. COUCHMAN.

Fletcher Moulton L.J.

Irish Court of Appeal in *Kelly* v. *Kerry County Council* (1) when dealing with the question of the death by lightning of a man working on the roads. They found that the accident did not arise out of his employment because there was no evidence that in following his employment he ran any greater risk of being struck by lightning *than any other person who was within the area of the storm.* This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers. But when a case arose of a man who by reason of his employment was exposed to the danger of lightning to a greater degree than other persons within the area of the storm, this Court in *Andrew* v. *Failsworth Industrial Society, Ld.* (2) held that the accident arose out of the employment. It would have puzzled any scientific man to say by how much the risk was increased, or whether a woodman or a worker on electric lines or many other kinds of workmen did not run an equal risk, but the Court rightly abstained from considering such questions. The case of extreme heat or extreme cold is similar to that of such a natural agency as lightning, excepting that it is easier, as in this case, to shew the direct connection between the accident and the employment. But the rule is the same. If the employment brings with it greater exposure and injury results, that injury arises out of the employment.

For these reasons I am of opinion that the appeal should be allowed with costs here and in the Court below. It would not be necessary to send the case back, inasmuch as the learned judge has made a finding as to the amount of compensation if the applicant be entitled to it, as in my opinion he is.

FARWELL L.J. I agree with the judgment of the Master of the Rolls, and not with that of Fletcher Moulton L.J. I am of opinion that the county court judge was right.

I assume, as he did, without expressing any opinion on the point, that the frost-bite was an accident, and I agree with him that although it occurred "in the course of" it did not "arise out of" the employment.

(1) 42 I. L. T. 23.

(2) [1904] 2 K. B. 32.

I take the test as stated by Lord Collins in *Andrew* v. *Failsworth Industrial Society, Ld.* (1): "Was the man exposed to something more than the normal risk, which everybody, so to speak, incurs at any time and in any place" when driving in an open trap on a very cold day with rain and sleet at intervals? I can see none. The squire in his dogcart, the farmer in his gig, the butcher, the grocer, the traveller, and the carter in their carts, were all in just the same position of exposure. If the injury had been caused by lightning, as in *Andrew* v. *Failsworth Industrial Society, Ld.* (2), the case would have been clear, and I see no more abnormality of exposure in the case of cold than in that of lightning. The county court judge has found as a fact that there was nothing in the workman's employment that exposed him to anything more than the ordinary risks, unless the necessity of taking off his right-hand glove from time to time to give change or make entries was sufficient, and he held that it was not. I agree with him and with the reasoning generally of his excellent judgment.

Appeal dismissed.

Solicitors: *Langham, Son & Douglas; Griffith & Gardiner.*

(1) [1904] 2 K. B. 32, at p. 35. (2) [1904] 2 K. B. 32.

W. C. D.

C. A.
1910
Nov. 11;
Dec. 3.

[IN THE COURT OF APPEAL.]

SKAILES *v.* BLUE ANCHOR LINE, LIMITED.

Employer and Workman—Compensation—"Workman"—"Remuneration"—Remuneration exceeding 250l. a Year—Purser—Bonus—Perquisites—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

"Remuneration" in s. 13 of the Workmen's Compensation Act, 1906, which excepts from the definition of "workman" any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year, is synonymous with "earnings" as used in the Act.

So held by the Court of Appeal (Fletcher Moulton L.J. dissenting).

A claim for compensation by the widow of the purser of a ship which was lost with all hands was resisted on the ground that the purser's remuneration exceeded 250*l.* a year. In addition to his regular wages, at the end of each voyage, whenever everything was reported to be satisfactory, the purser received, at a fixed rate per month, a bonus or extra wages. He also made a profit by the sale on board ship of whisky in nips. He was debited with so much per bottle, and nips were sold at a fixed price which produced a larger sum per bottle than the sum debited. This balance was kept by the purser with the knowledge and consent of his employers:—

Held (Fletcher Moulton L.J. dissenting), that both the bonus and the profit on the whisky ought to be taken into account in estimating the purser's remuneration.

Appeal from an award of the judge of the City of London County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of S. G. Skailes, who was the purser and chief steward on board the respondents' steamship *Waratah*, which was assumed to have been lost with all hands.

The respondents denied liability on the ground that the deceased was a person employed otherwise than by way of manual labour whose remuneration exceeded 250*l.* a year and was therefore not a workman within the Act. The deceased was originally appointed purser and chief steward to the respondents' steamship *Geelong* and was subsequently transferred to the *Waratah*. By the letter of appointment dated October 19, 1906, his wages were to be 8*l.* per month and he was to be allowed 5 per cent. commission on sales of wines, spirits, and slops. But he in fact usually received an extra payment at the

end of a voyage, at first at the rate of 1*l.* per month and after two years' service at the rate of 2*l.* per month, in addition to the 8*l.* mentioned in the letter of appointment. These extra payments were granted to stewards on board the respondents' ships whenever everything on the voyage was satisfactory. By a letter dated October 16, 1906, written by the respondents' managers, W. Lund & Sons, to Captain Ilbery, the captain of the *Geelong*, announcing Skailes' appointment and enclosing a copy of some new regulations which the respondents had issued together with a copy of their new increasing scale of wages, Captain Ilbery was requested after perusal to hand over these documents to Skailes. The new scale of wages included the extra payments above referred to. The terms upon which these extra payments were made appeared from the entries with respect thereto in the respondents' accounts. The last of these entries (which were all in the same form) was as follows:—

"It having been reported that everything has been satisfactory during the voyage: no complaints having been received and justified: and everything found in order on arrival in London Mr. S. G. Skailes is entitled to extra wages at the rate of 2*l.* per month during the period of this voyage.

"(Signed) W. Lund & Sons,

"Managers.

"5th Nov. '08 to 7th Mar. '09.

Four months three days @ 2*l.* per mo. . . £8 4 0"

In the receipt given by the deceased for this sum it was described as "conditional money."

It appeared that on board the respondents' vessels the purser was debited with 4*s.* for every bottle of whisky; that a certain amount of whisky was sold in nips which were charged for at 6*d.* apiece; that a bottle of whisky supplied from twelve to fifteen nips; and that it was the practice of the purser, either alone or in conjunction with the barman, to pocket the profit arising therefrom over and above the 4*s.* This practice was recognized by the respondents as perfectly legal, it being found impossible to check the amount of the profit, which they regarded as the man's perquisite. If they could check it they would take the profit themselves and increase his wages.

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

The county court judge in estimating the remuneration of the deceased disallowed these two items. With regard to the profit on the whisky during the last voyage of the *Waratah* he thought there was no proof of it, however probable it might seem that a considerable profit was made. With regard to the extra payment or bonus, that appeared to him to be in the nature of a present for good conduct. In the result he made out the total remuneration as follows :—

Wages	£82	0	0
Shore money	13	10	0
Commission	75	0	0
Board and lodging at 4*s.* per day . .	61	12	0
	£232	2	0

and he made an award of 300*l.* in favour of the applicant.

The employers appealed. There was also a cross-notice of appeal by the applicant, but this was abandoned at the hearing.

A. Neilson and *Langton*, for the employers. In estimating the amount of the deceased's remuneration the county court judge has disregarded two items which he ought to have taken into account—1, the bonus given at the end of the voyage when everything is satisfactory; 2, the profits arising from the sale of whisky in nips. As to 1, this bonus was part of the man's wages and not the less so because it was conditional, and it is immaterial whether or not it was included in the contract: *The Elmville* (No. 2). (1) That was a case under the Merchant Shipping Act, 1894, but the same principle applies. Further, these extra payments were in fact a term of the contract, for in the letter of the employers announcing Skailes' appointment to the *Geelong* the captain was requested to hand to the purser the new scale of wages, which included these extra payments, and it must be presumed that he did his duty. The proper inference, therefore, is that these payments were brought to Skailes' notice at the time of his appointment. As to 2, this profit was recognized by the employers as a perquisite of the steward, who was paid less

(1) [1904] P. 422.

wages in consequence. The matter must therefore go back for a rehearing. [They also referred to *Rosenqvist* v. *Bowring & Co., Ld.* (1) and *Reg.* v. *Postmaster-General.* (2)]

Hon. E. A. Harney, for the applicant. In order to bring the bonus into account it must be shewn that it is either expressly or by implication a term of the contract, and that the employers have failed to do. Remuneration is a return given by the employer to the servant for that which the latter has agreed to do. For his duty as purser the deceased was paid 8*l.* per month. The additional 2*l.* is conditional on everything having gone smoothly. He is remunerated for the discharge of his duty, but he might have discharged his duty perfectly and yet not have been entitled to this bonus. The extra payment was not given for anything within the servant's control, and therefore it cannot properly be treated as remuneration within the Act. As to the profits from the sale of liquor at the bar, there was no evidence of any profit. [He referred to *Penn* v. *Spiers & Pond, Ld.* (3)]

Neilson, in reply, referred to *Dothie* v. *Robert Macandrew & Co.* (4)

Cur. adv. vult.

Dec. 3. COZENS-HARDY M.R. This is an appeal by the dependant of a purser and chief steward of the steamship *Waratah*, which is taken to have been lost with all hands, although the precise time and place of the disaster are not known. The shipowners resist the claim on the ground that Skailes was a man employed otherwise than by way of manual labour whose remuneration exceeded 250*l.* a year: s. 13 of the Act of 1906. Now "remuneration" is not the same thing as salary or cash payment by the employer. The word "remuneration" is only found in s. 13 of the Act and in Sched. I., par. 2 (*a*), and this latter paragraph satisfies me that remuneration involves precisely the same considerations as earnings. I do not think it is open to this Court, after our decision in *Dothie* v. *Robert Macandrew & Co.* (4), to take any other view. We there held that the value of board and lodging must be brought into account

(1) [1908] 2 K. B. 108.
(2) (1875) 1 Q. B. D. 658; affirmed, (1878) 3 Q. B. D. 428.
(3) [1908] 1 K. B. 766.
(4) [1908] 1 K. B. 803.

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

Cozens-Hardy M.R.

in considering whether the remuneration of the deceased man exceeded 250*l.*, and that the mere cash salary was not to be solely regarded. The learned judge in the City of London Court found that his remuneration was 232*l.* 2*s.*, composed of sea-going wages, wages while the vessel was in harbour, board and lodging, and certain other unspecified items, but he rejected two items which it is now necessary to deal with.

Skailes was first appointed on October 19, 1906, purser and chief steward to the *Geelong* steamship, from which he was subsequently transferred to a larger vessel, the *Waratah*. The letter appointing him said that his wages would be 8*l.* per month, with 5 per cent. commission on all sales of wines, spirits, and slops. Now it appears from accounts signed by the managers of the Blue Anchor Line, and admitted to be accurate, that Skailes was first paid at the rate of 1*l.* per month and lastly at the rate of 2*l.* per month in addition to the 8*l.* mentioned in the written agreement. The sums so paid are described in print at the foot of the accounts as "extra wages," to which he was "entitled," but preceded by the statement, "It having been reported that everything has been satisfactory during the voyage, no complaints having been received and justified, and everything found in order on arrival in London." The receipt is also produced given by Skailes to the company, in which the sum of 8*l.* 4*s.*, calculated at the rate of 2*l.* per month, is described as "conditional money." The learned judge seems to have held that the only matter which he could regard was the written agreement of October 19, 1906. I am unable to adopt this view. I think there was ample evidence that the sums were paid not as voluntary gratuities, but as extra wages to which Skailes was entitled. The inference is irresistible when the accounts are looked at.

But then it is urged that this was only a conditional payment, and that a sum which may or may not become payable ought not to be considered in ascertaining the amount of remuneration. I am unable to follow this. Nothing is more common than that remuneration should vary according as the gross takings or the net profits of a business do or do not exceed a certain figure.

The other item is of this nature. The usage on board vessels

of this class is that the chief steward is debited with a certain price, say 4*s*., for a bottle of whisky, and that nips of whisky are charged at 6*d*. In fact a bottle supplies more nips than are required to produce, say, the 4*s*., and in reference to these nips the employers make no claim, and the chief steward, either alone or with the barman, is recognized as entitled to put the money in his own pocket. The evidence of the employers on this point was perfectly clear, and it was admitted that but for this advantage a larger sum would have to be paid to the chief steward as wages. It was until the very end of the hearing contended that the retention of these moneys was illicit. That, however, after the evidence given by the employers, could not be maintained, but it was contended further that no evidence as to amount was given. The learned judge rejected this item, partly, I think, on the ground that it was not mentioned in the letter of appointment, and partly on the ground which I have just indicated. In my opinion the learned judge was wrong. It is true that there is no direct evidence that a single bottle of whisky was opened on board, and no such evidence can be forthcoming, because the vessel with all on board is at the bottom of the sea. But in a case like this it is competent to the judge, and in my opinion it is the duty of the judge, to estimate as best he can what amount ought to be allowed in respect of these sums which in ordinary course Skailes would have been allowed, with the full knowledge of his employers, to retain. The decision of this Court in *Penn* v. *Spiers & Pond, Ld.* (1) seems to me to be abundant authority for this. I may point out that the learned judge has formed such an estimate in respect of wine and spirits sold during this voyage, for he has allowed 5 per cent. commission.

The result is that in my opinion the matter must go back to the learned judge to consider the case on these two items. He need not trouble himself to estimate the precise figures if he is satisfied that either or both of these items will bring the remuneration beyond 250*l*. a year. The respondent must pay the costs of the appeal. The costs in the Court below will be dealt with by the learned judge after he has reconsidered the case.

(1) [1908] 1 K. B. 766.

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

FLETCHER MOULTON L.J. This case for the first time, so far as I know, raises a question which necessitates a careful examination of the definition of "workman" in the Workmen's Compensation Act, 1906. Its object and effect is to define the class of persons to which the Act applies. All that do not come within this definition are excluded from its benefits, and therefore a correct appreciation of the delimitations which it creates is of great public importance. The definition reads as follows: "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, it means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing." It will be seen, therefore, that the term "workman" includes all persons who have entered into or work under a contract of service or apprenticeship with an employer with certain exceptions. These exceptions are set out in the earlier part of the clause, and the language used is such as to make them appear at first sight to be personal exceptions excluding the person from the benefit of the Act. But a closer examination convinces me that this is not the true reading and that the whole clause has in view the contract of service and not the individual. For instance, a person may occupy a portion of his time by being an outworker, but no one would contend that if the remainder of his time was occupied in service under an ordinary contract of service, say as a watchman, and an accident occurred to him while so engaged, his employer under that contract of service could escape paying compensation under the Act. The same might be said of the other exceptions. I have come, therefore, to the conclusion that the true meaning of the definition is that working for an employer under a contract of service of the excluded kind prevents the individual from being a "workman" by reason of that contract so as to have

the right to make a claim upon his employer under that contract, but that it does not affect his acquiring the requisite status under some other contract of service under which he may also work. In other words, the definition deals with the acquisition of the status of a workman by reason of a contract of service, and the exceptions do no more than provide that this status does not attach to him by reason of certain classes of contract. "Contract of service," "employer," "employed," run throughout the definition and are found in every part of it. They are correlative words, and their use in the definition shews that it is the status of the workman acquired by reason of the particular contract which is alone referred to.

This becomes of special importance when we deal with the exception which is pleaded in this case. It is said that the claimant comes under the exception of a "person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year." In my opinion this, just as is the case with the other exceptions, is a description of the contract of service. To enable a claim to be made under a contract of service it must not (unless it is one for manual labour) be one in which the remuneration is higher than 250*l.* a year. This "remuneration" is the remuneration under the contract, and therefore it is not identical with the "earnings" or "average weekly earnings" of Sched. I., pars. 1 and 2. For instance, Sched. I., par. 2 (*b*), by virtue of which the earnings under concurrent contracts of service are taken into consideration in calculating the "earnings" or "average weekly earnings" of the workman, applies only to the provisions of that schedule and is inapplicable here. I find no difficulty in accepting the conclusion that this limit refers to the remuneration fixed by the contract of service in question. It might be suggested that this exception is inserted for the purpose of limiting the amount of compensation recoverable under the Act. But it is evident that this is not so. The maximum amount of compensation recoverable is subject to much stricter limits. For instance, in the case of death it is three years' wages, but may not exceed 300*l.*, and in the case of total incapacity it is substantially half the wages, but it may not exceed 1*l.* per week, both of which

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

Fletcher Moulton L.J.

limits come into play long before the remuneration reaches 250*l.* a year. So far as limiting the maximum compensation recoverable is concerned, the figure might be fixed at 200*l.* or even 150*l.* without its affecting in any way the compensation granted. This exception must therefore be inserted as a description of the contract of service where the remuneration is so high that it puts a man outside the class to which the Act is intended to apply. A contract which satisfies such a description is not a contract which constitutes a man a "workman" within the Act.

The principle that these exceptions are descriptions of the contracts of service to which the privileges of the Act are not attached leads to an important legal consequence. The disability must be determined by the contract itself and not by an ex post facto examination of what may have happened under it. This appears to me to be in harmony with the objects of the clause. Employer and workman when entering into a contract ought both of them to know whether it is a contract to which the responsibilities and privileges of the Act attach. The employer needs to know it in order that he may provide against the liabilities which the Act imposes. The workman needs to know it in order that he may form a true conception of the return which he will receive for his work. One would therefore expect that the Legislature would make it dependent on the nature of the contract itself. This is fortified by the consideration that it is important that the tribunal for settling disputes should be able to decide in limine whether it has jurisdiction or not. I cannot be readily brought to believe that the Legislature intended the tribunal to go through the whole of the investigation of the claim in order to decide whether it had jurisdiction to entertain the claim at all. In saying this I must not be misunderstood. It frequently and in fact generally is necessary in the case of a tribunal of limited jurisdiction that it should decide some preliminary point of fact or law to ascertain whether a claim comes within the purview of its powers. But it rarely happens that the preliminary inquiry thus necessary is identical with the whole dispute which is brought before it, and it is evidently most undesirable that such should be the case. The above interpretation which on other grounds I have given to the

definition of "workman" avoids this difficulty. In my opinion, the tribunal in order to determine whether it has jurisdiction has to look at the contract only and to decide whether or not such a contract of service comes within the exception. In so doing it must of course interpret the contract fairly. If in addition to wages there is remuneration in kind, such as gratuitous board and lodging, it must take a fair estimate of the annual value of such remuneration to the workman. And even where part of the remuneration is in the form of gratuities so customary and so capable of being estimated as to justify their inclusion in "earnings" (as in the case of waiters' tips), I think it probable that they also must be taken into consideration in deciding whether the contract of service comes within the exception. But these special cases do not militate in any way against the principle that the jurisdiction is decided by a consideration of the contract itself. If the value of a waiter's contract so estimated by making a fair allowance for the tips which such a position would ordinarily bring with it comes below the 250*l.* limit, he would, in my opinion, be a workman entitled to the benefits of the Act, and he would not be deprived of those benefits by the employer shewing, after a claim had arisen, that in fact the lavishness of some customers during the year previous to the accident had actually raised his receipts above the limit. The jurisdiction of the tribunal is decided by the contract, and not by that which is found to have actually happened thereunder during any particular period.

In applying these principles to the facts of the present case we shall have to consider the position of provisions which are contingent on the happening of future events. For example, if a workman is employed at 3*l.* per week and is entitled to be paid 1*s.* an hour overtime, is that contract of service within the limit or not? To my mind this depends on whether a certain amount of overtime is a normal incident of the employment. It is well known that in banks clerks have as a normal incident of their employment to work overtime immediately before the preparation of the annual balance-sheet, and with stockbrokers it is similarly a normal incident of their employment that they should work overtime immediately preceding settling days. A

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

Fletcher Moulton L.J.

fair estimate of the remuneration which will thus come to them as a normal incident of their employment forms, in my opinion, a part of the tribunal's duty in deciding the remuneration at which they are employed under the contract. But where the additional payments are entirely contingent on future events which cannot be thus foreseen I cannot see that they ought to be taken into consideration in determining the question of jurisdiction. A year of trade may pass in which there is no demand for working overtime. On the other hand there may be crises when overtime is largely worked. But no one can foresee whether there will or will not be this demand for labour, and such demand cannot be called a normal incident of the contract of service so as to justify an estimate being made of it in ascertaining the remuneration at which the workman is employed under the contract of service. In such a case the tribunal is bound to neglect these possibilities in deciding whether it has jurisdiction, and when once, with a proper regard for these considerations, it has decided that it has jurisdiction, the result of the investigation into the actual "earnings" or "average weekly earnings" of the workman during the period which the tribunal has to consider for the purpose of determining the compensation has no retrospective effect on the correctness of the determination with regard to jurisdiction.

It is evident that difficult questions may arise from the application of these principles, but that furnishes no argument against their soundness. Where the remuneration under the contract of service is not specifically above the prescribed limit, it is clearly for the employer to shew that the indirect advantages are capable of estimation and are rightly included in the estimate of remuneration and that they bring the total remuneration above the statutory limit, and if he is unable to prove this the tribunal will have jurisdiction.

I have now to apply these considerations to the facts of the present case. The deceased workman was chief steward and purser in the employ of the respondents, who are the owners of the Blue Anchor Line. He was engaged under a letter dated October 19, 1906, in which his remuneration is stated to be 8*l.* per month and 5 per cent. commission on all sales of wine,

spirits, and slops. That he should also have the advantage of free board and lodging was incident to his position. There is no direct finding as to the value to be put on the board and lodging, but I take it that the judge estimated it at somewhere between 3*s.* and 4*s.* per day. There was evidence that the average amount of commission which might be calculated upon was about 30*l.* per voyage on the larger type of vessel and somewhat less on the smaller type, and there seem to have been two and a half to three voyages a year. These are matters of fact on which the judge has given no direct finding, and as it is admitted that if the appeal is allowed the case must go back to him, I need not dwell upon the actual figures. It suffices for the purpose of the appeal to say that the question whether or not the remuneration under the contract is or is not above the statutory limit depends on the propriety of the admission of the two items with which I am about to deal and the pecuniary estimate which is to be put upon them.

The first of these items may for convenience be called the bonus item. It would appear that, although it is not mentioned in the letter of engagement, it was the custom of the respondents, under certain circumstances, to give a bonus to their head steward. The evidence is to my mind unsatisfactory as to the respondents having brought to the notice of the deceased this bonus and the conditions under which it would be given at such a time and in such a way as to make it a part of the contract of employment, but I assume this in favour of the respondents. In the steward's accounts of each voyage which were submitted to and passed by the respondents, there is at the end of the account the following words: "It having been reported that everything has been satisfactory during the voyage, no complaints having been received and justified and everything found in order on arrival in London, Mr. S. G. Skailes is entitled to extra wages at the rate of 1*l.* per month during the period of this voyage or say 2*l.* (two pounds) in all," and this is signed by the defendants, W. Lund & Sons, who are the managers of the line. A separate receipt was given by the steward for this bonus, and it is described therein as "conditional money." It is clear, I think, from these documents that the bonus was only

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

Fletcher Moulton L.J.

given under the circumstances described above, and that it was looked upon between the parties (as in fact it was) as additional to the remuneration named in the letter of engagement.

It is evident, therefore, that this bonus was not dependent solely on the performance by the steward of his contract. It was contingent on many things beyond his own control. The misbehaviour of servants giving rise to justifiable complaints expressly deprived him of any claim to it, although it would not constitute any breach of contract on his part. Indeed I believe that the true view of the bonus is that it was a voluntary payment by the employers contingent on their being satisfied not only with the behaviour of the steward but also with its results, and it is quite arguable that they were the sole judges whether it should or should not be given, and that therefore it was in the nature of a voluntary gratuity. But that is not the important point to my mind. The important characteristic of the bonus was that it was a payment contingent on the happening of events which could not be foreseen. No one could prophesy whether there would or would not be trouble in connection with the steward's department on the voyage. Assuming that the steward did all that it was his duty to do, so that no complaint could be made of his behaviour, it was still a matter of good luck whether that sufficed to bring about the state of things under which the bonus was payable. Applying the principles which I have enunciated above, I am of opinion that the Court in deciding the preliminary question of jurisdiction ought to have excluded this contingent advantage from their consideration in arriving at the remuneration under the contract.

The next item is of a very peculiar kind. It is abundantly clear from the letter of engagement that the wines, spirits, &c., were supplied to the steward to be sold at the prices fixed by the wine list and that he had no power to alter these prices, and that the money received by him for the goods was the money of his employers and had to be returned to them intact. He was remunerated by a percentage on the amount sold. But it would appear that it was a known practice on board those vessels for persons to buy "nips" of spirits which were supplied to them in glasses and charged at the rate of 6*d*. per glass. There was

evidence also that, although the price of spirits was, say, 4*s.* a bottle, the number of nips which such a bottle could supply considerably exceeded eight, so that the receipts from a bottle sold in this way shewed a profit over the 4*s.* at which the bottle would be returned in the steward's account with his employers. I confess that I have great difficulty in seeing how the steward was entitled to retain any money derived from the sale of spirits, and I doubt very much whether it was not within the powers of the employers to give directions that all the money so obtained should be paid into the till and handed over to them, if indeed it was not his duty to see that this was done without any specific orders. But I will assume for the sake of this judgment that the practice was so notorious and was winked at by the employers in such a way that the retention of the money by the steward was not a breach of his contract with them. At the trial no evidence of any kind was given as to the amount which such a privilege would bring in or what portion of this would be retained by the barman who actually serves the customers. There is no evidence of any kind as to how many bottles were sold in this way or what proportion the spirits consumed in this way bore to the total amount of spirits consumed on the voyage. The only semblance of evidence bearing on the matter is that one of the partners of the managing firm gave an estimate of the amount that such a steward should make per month, but it was not pretended that that estimate rested on any knowledge. On the contrary, the position taken up by the managers with regard to this retail consumption of spirits was that it was impossible for them to know how much or how little was so sold. Under those circumstances the estimate by that witness of the total earnings of the steward is vitiated by his being incapable of giving evidence as to the very item on which the total depends, and I attach no importance to his statement. I am therefore of opinion that the finding of the learned judge with regard to this item was correct. He says: "I think that this profit on the whisky at the bar—that there is no proof of it, and however probable we may think that he made a considerable amount of profit on it, there is no proof of it, and therefore that has to go."

C.A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

Fletcher Moulton L.J

The question before us is what should be done with this appeal. On the one hand, in my opinion, the appellants have not shewn that the decision was wrong on either of the points which they raised in their notice of appeal. But I think that the argument on the appeal has made it evident that the judge did not direct his attention to the issues necessary for the proper determination of the questions before him. The appeal must therefore be allowed and this case go back to the county court judge. As he was not specifically asked by counsel for either of the litigants to decide what I hold to have been the correct issues, my own view is that justice would be done in this case by sending the award back to the learned judge and leaving the costs of the first hearing and of this appeal to be in the discretion of the judge on the second hearing, but as my brethren are not of this opinion their decision will prevail.

FARWELL L.J. I agree with the judgment of the Master of the Rolls and not with that of Fletcher Moulton L.J. In my opinion the appellants are right on both points. The whole scheme of compensation provided by the Act is based on earnings, and it is only reasonable to suppose that when a man is excluded from the operation of the Act on account of the magnitude of his "remuneration" this word should be used in the same sense as earnings. I am confirmed in this view by the words of Sched. I., par. 2 (*a*), "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated," and by Fletcher Moulton L.J.'s opinion in *Dothie* v. *Robert Macandrew & Co.* (1) He there says: "Under the Act no person not employed in manual labour is a 'workman' within the meaning of the Act if he receives a remuneration exceeding 250*l.* a year. If he receives less than that, then he is entitled in cases of accident coming within the purview of the Act to compensation based on the remuneration which he was actually receiving. The same word is used in the Act in both cases, and in my opinion the Court is bound to give exactly the same meaning to the word 'remuneration' when it is estimating compensation as when it

(1) [1908] 1 K. B. 803.

is deciding whether a person is a 'workman' within the meaning of the Act." Treating "remuneration" then as synonymous with earnings, I cannot doubt that the so-called bonus must be taken into account. I agree with the Master of the Rolls that reading the letter to Captain Ilbery of October 16, 1906, which imposed on him a duty to be performed by him at once, and coupling that with the fact that the deceased was in fact paid extra wages, that the documents put in shew that the employers acknowledged that he was "entitled" to these sums "as extra wages," and that he gave receipts for the same, the inference is irresistible that these payments were part of his wages and must be taken into account accordingly, and that there is ample evidence of contract. Even apart from the letter, and if there were nothing but the note acknowledging the liability and the receipt, I am of opinion that there would be ample evidence. I know of no way in which a man can be "entitled to extra wages" except by contract, and I feel no difficulty in the use of the word "conditional." Agreed additional remuneration contingent on a quick passage, or on a dividend exceeding 5 per cent., would clearly fall within the word "remuneration" in the Act, although the quickness or the increased dividend depended on luck and were independent of the employee's own conduct.

As to the other point, it is impossible to check the amount received in respect of whisky sold in "nips" and not by the bottle; consequently the employers expressly allow the steward to keep as his perquisites anything that is realized over and above the cost price of the bottle, and by reason thereof pay him less wages. I see nothing wrong or irregular in this. The county court judge has refused to take these perquisites into consideration because there is no evidence of the amount sold in nips. As the *Waratah* was lost with all hands, there is of course no evidence that any whisky at all was sold; but the Legislature, foreseeing the difficulty of ascertaining the amount of earnings in accordance with the strict rules of evidence, has provided that average weekly earnings shall be computed in such manner as is best calculated to give the rate per week: Sched. I., par. 2 (*a*); and in the "tip" case this Court directed the county court judge

C. A. 1910

SKAILES v. BLUE ANCHOR LINE, LIMITED.

to estimate the amount of a deceased waiter's tips as best he could, and the same direction must be given here.

Appeal allowed.

Solicitors for appellants: *Holman, Birdwood & Co.*
Solicitors for respondent: *Lowless & Co.*

H. B. H.

C. A. 1910

Nov. 10, 11; *Dec.* 3.

[IN THE COURT OF APPEAL.]

BRANDY *v.* OWNERS OF S.S. RAPHAEL.

Employer and Workman — Compensation—Amount — Seaman — Member of Royal Naval Reserve—Concurrent Contracts of Service—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9, *sub-s.* 1; *Sched. I., par.* 2 (*b*).

Sect. 9, sub-s. 1, of the Workmen's Compensation Act, 1906, which excludes from the operation of the Act persons in the naval and military service of the Crown, deals solely with the rights under the contract of service with the Crown, and in no way affects the rights of any such person under a contract of service with a private employer, and, although the Crown cannot be made liable under the Act, the contract with the Crown is a contract of service within par. 2 (*b*) of Sched. I., which deals with concurrent contracts of service; consequently, in estimating the amount of compensation payable in respect of an accident arising out of and in the course of the private employment, regard must be had to the earnings of the injured man in the service of the Crown.

So *held* by the Court of Appeal (Farwell L.J. dissenting).

Therefore, where a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve, and as such entitled to a retainer of 6*l.* a year, met with an accident within the purview of the Act while employed on the merchant ship, and was thereby disabled from continuing to serve in the Royal Naval Reserve:—

Held (Farwell L.J. dissenting), that in estimating the amount of compensation payable to him by the shipowner the retainer ought to be taken into account as being earnings under a concurrent contract of service.

Per Cozens-Hardy M.R.: Having regard to the regulations applicable to Royal Naval Reserve stokers the retainer was incidental to the man's employment on the merchant ship.

APPEAL from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, who was a stoker on the steamship *Raphael* and was also a Royal Naval Reserve stoker, met with an accident on board the respondents' vessel which necessitated the amputation of two fingers and disabled him from continuing to serve in the Royal Naval Reserve.

By the regulations applicable to Royal Naval Reserve stokers any fireman, being a British subject of good character and not under eighteen nor above twenty-five years of age, and physically fit, might be enrolled in the Royal Naval Reserve as a stoker if he could produce (*a*) satisfactory evidence of employment at sea in a stokehold or engine-room in a capacity not lower than that of fireman, and make a declaration that it was his intention to follow the sea for a period of at least five years from the time of his enrolment; or (*b*) satisfactory evidence of ability as a fireman or furnaceman ashore and make a declaration that it was his intention to follow his work of tending fires and furnaces for a period of at least five years from the time of his enrolment. Men confirmed as stokers were bound to undergo twenty-eight days' training in alternate years, during which period they received special pay, and they were liable to serve as stokers in the Fleet when the Naval Reserves were called out by Royal Proclamation in time of emergency; they were entitled to a retainer of 6*l.* a year from the date of enrolment. The regulations also provided that if the men were wounded or killed while on service or under training the compensation to be granted should be the same as in the case of stokers in the Royal Navy.

The only question at issue was whether, in estimating the amount of compensation payable to the applicant, this retainer, which works out at 2*s.* 4*d.* per week, ought to be taken into account as being earnings under a concurrent contract of service.

The county court judge decided this question in the affirmative and awarded that half the 2*s.* 4*d.* should be added to half his weekly earnings from the shipowners.

The shipowners appealed.

Segar, for the shipowners. There were not here two concurrent contracts of service within the meaning of Sched. I., par. 2 (*b*),

C. A. 1910

BRANDY v. OWNERS OF S.S. RAPHAEL.

because the man was not working at one time for one employer and at another time for another. While working on board the merchant ship he was the servant of the shipowners, and until he was called up for actual service his whole time was devoted to the merchant service, and there was no moment of the day during which he was working for the Admiralty. In the regulations actual service is expressly distinguished from the time when the naval reserve man is merely on the books. The actual service pay is the wages he receives from the other employer, and if he is called up for actual service his service on the merchant ship entirely ceases and he has no claim on the shipowner at all. There is no service under each employer which satisfies the paragraph. Further, by s. 9, sub-s. 1, persons in the naval service of the Crown are excluded from the operation of the Act. To satisfy par. 2 (*b*) there must be two employments and two employers under the Act, and if one of those employers is exempt from the Act there can be no concurrent contracts of service. It cannot be contended that the disqualification in s. 9, sub-s. 1, is a personal disqualification so as to exclude a man in the naval service from all compensation under the Act, but the section applies to him in his capacity of naval servant. Qua that service there is neither workman nor employer within the meaning of the Act, and his service with the Admiralty is for all purposes as if it did not exist. There is no case where account has been taken of earnings in any employment in which the employer could not be an employer under the Act. Earnings which are not the result of a contract for service must be excluded. [He referred to *Gough* v. *Crawshay Brothers, Cyfartha, Ld.* (1); *Dewhurst* v. *Mather* (2); *Simmons* v. *Heath Laundry Co.* (3)]

Stewart Brown and *H. Harding*, for the workman. First, this 6*l.* is part of the man's earnings on the merchant ship. In order to get that money he must be a stoker in the merchant marine; it is money earned by reason of his employment on the ship, and it is so closely connected with that employment that it may fairly be regarded as an incident of the employment just as much

(1) [1908] 1 K. B. 441. (2) [1908] 2 K. B. 754.
(3) [1910] 1 K. B. 543.

as the waiter's tips in *Penn* v. *Spiers & Pond, Ld.* (1) Secondly, there were here two concurrent contracts of service within Sched. I., par. 2 (*b*). That provision was intended to prevent the arbitrator from looking only at the employment of the master in whose service the workman was at the time of injury and so producing illusory awards. It is said that the services rendered here are not concurrent but consecutive, but clause (*b*) says that the contracts, not that the services, must be concurrent. Then it is said that this 6*l.* must be excluded because by s. 9, sub-s. 1, the Act does not apply to persons in the naval service of the Crown. Accepting for the purpose of this argument that this man was in the naval service, the only effect of that is to prevent the Admiralty from being made liable, compensation in such cases being regulated by sub-s. 2; but it does not follow that in determining the measure of compensation to be paid by a private employer the contract of service with the Crown is not to be regarded. The intention of the Legislature was that the employer should compensate the workman for the loss of his wage-earning capacity whatever it was.

Segar in reply. The tips which a waiter receives are an incident of his employment and are properly taken into account, in estimating his wages. But here all the firemen are paid a standard rate of wages quite irrespective of whether they are in the Naval Reserve or not, and there is no evidence that the shipowners knew that the applicant was in the Naval Reserve.

Cur. adv. vult.

COZENS-HARDY M.R. This appeal raises an important question as to the compensation payable under the Workmen's Compensation Act to a stoker on a merchant vessel who is also a Royal Naval Reserve stoker. The facts may be shortly stated. A man cannot be enrolled in the Royal Naval Reserve as a stoker unless he produces evidence of his employment at sea in a capacity not lower than fireman and makes a declaration of his intention to follow the sea for at least five years, or unless he furnishes evidence of his ability as a fireman ashore and makes a similar declaration. One of the obligations is to undergo certain training

(1) [1908] 1 K. B. 766.

C. A. 1910

BRANDY v. OWNERS OF S.S. RAPHAEL.

Cozens-Hardy M.R.

afloat. When afloat, under training, he is entitled to certain pay per day and other allowances, and he is also entitled to a retainer of 6*l.* a year.

Brandy met with an accident on board the steamship *Raphael* which resulted in the amputation of two fingers. This has disabled him from continuing to serve in the Naval Reserve. He has lost the retaining fee of 6*l.*, and he claims as against the shipowners that half the amount he received as a member of the Royal Naval Reserve, which may be taken as 2*s.* 4*d.* per week, should be added to half his weekly earnings from the shipowners. The learned county court judge has held that this contention is correct and has made an award in his favour.

The case may be looked at in two ways. It is contended that there are "concurrent contracts of service" with two employers within the meaning of par. 2 (*b*) of the First Schedule, and, alternatively, that the money received from the Government is an element which the shipowners must have taken into account in fixing his wages, and that this sum was incidental to his employment as a stoker on board the *Raphael*.

As to the first point, apart from s. 9, I think there were concurrent contracts of service. Brandy's contract was that in consideration of the payment of 6*l.* a year he would continue as a stoker and keep himself fit to serve in the Fleet whenever called upon so to do by proclamation, and would also undergo certain training. It is no doubt true that at the moment of the accident he was not in actual service with the Fleet. Nevertheless, I think there was a subsisting contract of service under which the Admiralty had a right to require him to leave the *Raphael*. But then it is said that this is not so because, by s. 9, the Act does not apply to persons in the naval or military services of the Crown, and that being so his contract with the Admiralty must for all purposes be disregarded, with the result that there are not two concurrent contracts. I have felt, and still feel, considerable doubt on this point. The words cannot be read literally, so as to exclude Brandy from all right under the Act against the shipowners because he is in the naval service of the Crown. This has not been contended. Some narrower construction must be adopted. Upon the whole I think

the object and effect of s. 9 was only to exempt the Crown from being rendered liable under the Act, a separate provision being contemplated as applicable to soldiers and sailors in s. 9, sub-s. 2. In other words, though Brandy cannot claim compensation against the Crown, it does not follow that we ought not to have regard to the undoubted fact that he is receiving money from the Crown under the contract of service.

The consequences of the opposite view are startling. In the common case of a workman who has a contract with employer A. and has accepted a scheme of compensation under s. 3, and has also an ordinary contract of service with employer B., it is plain that the workman cannot claim compensation under the Act against A., but can claim against B. And I hesitate to say that the workman's rights against B. are reduced by reason of the scheme. Similar observations would apply to a casual labourer employed by A. for his private purposes and by B. for the purposes of his trade or business. There is nothing in par. 2 (*b*) which necessarily involves liability on the part of *both* employers. No right is given to one of them to claim contribution from the other.

On the second point I think the argument on the part of the workman is economically and theoretically sound. A stoker who is liable to be summoned from the ship is not likely to get the same wages as a stoker who is not subject to this liability. The receipt of the 6*l.* must be taken to be known by the shipowners. It is a sum earned by reason of his employment on the ship, and I think the analogy of *Penn* v. *Spiers & Pond, Ld.* (1) is close.

The result is that in my opinion the county court judge was right in the view which he took, and that this appeal must be dismissed.

FLETCHER MOULTON L.J. The point in this case is a very interesting one. The applicant was a fireman and a member of the Royal Naval Reserve. Under the provisions of the Acts and Regulations which govern the Royal Naval Reserve the firemen are expected to keep themselves in active employment in the mercantile marine, but nevertheless are subject at any moment

(1) [1908] 1 K. B. 776.

C. A. 1910

BRANDY v. OWNERS OF S.S. RAPHAEL.

Fletcher Moulton L.J.

to be called out for active service. They also have to undergo a period of training during certain periods for which they are specially paid at fixed rates. For this claim upon their services they receive an annual payment or retainer of 6*l.* per year, or about 2*s.* 4*d.* a week. There is no dispute about the accident or the liability, but in estimating the average weekly earnings of the man the learned county court judge has taken into consideration this 2*s.* 4*d.* a week as being earnings under a concurrent contract of service. From this decision the respondents have appealed, and they contend that it ought to be entirely excluded from consideration in estimating the compensation to be given.

The points raised are two in number. In the first place it is said that it is not earnings, and in the second place it is said that it is expressly excluded by s. 9, sub-s. 1, of the Act, which reads as follows: "This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person."

With regard to the first point I fail entirely to understand the grounds on which it is suggested that these are not earnings. They are payments under a definite contract of service which includes not only actual service during a certain period of the year (when of course the payment is at a different rate), but also the liability to be called upon to perform actual service at any other period. This contract of service lasts throughout the year, and to my mind the payment is typically in respect of a concurrent contract of service. The remuneration under it ought therefore to be taken into consideration in estimating the average weekly earnings of the applicant.

The second point is a more difficult one and raises a question not unlike that which this Court has had to consider in the case of *Skailes* v. *Blue Anchor Line*. (1) The language of s. 9, sub-s. 1, appears at first sight to create a personal disqualification in all persons in the naval and military service of the Crown, so that as individuals they are excluded from claiming the benefit of the Act. But, as in the other case, a closer examination convinces

(1) Ante, p. 360.

me that this is not the true meaning of the provision. If we so construe it we should be obliged to go to greater lengths than even the appellants venture to contend for, and we should have to hold that a seaman who is employed in the Naval Reserve and is expected to keep himself in work in the mercantile marine so as to be fitted for active service at any moment would be precluded from claiming against his employers in the mercantile marine because he was personally disqualified by s. 9, sub-s. 1. This is clearly an impossible interpretation, and therefore to my mind there is no alternative except to take it that this provision deals solely with the rights under the contract of service with the Crown. It precludes the fireman from making claims against the Crown, but is not intended to deal with and does not deal with the rights of other parties with whom he may have made contracts of service. In short its object is in no wise to protect or shield from claims persons other than the Crown.

This being so, the claim is rightly made, and the only question is whether the contract of service with the Crown comes within the provision as to concurrent contracts which is found in Sched. I., par. 2 (*b*), which relates to concurrent contracts of service. Now there is nothing whatever in the Act to say that a contract of service with the Crown is not a contract of service. It is perfectly true that the employer is in such a case shielded from claims under such contract of service, but that is in these contracts the personal privilege of the Crown and does not arise from the contract with the Crown being declared by the Act not to be a contract of service at all. The language of Sched. I., par. 2 (*b*), is perfectly general. The contracts of service therein referred to are not restricted to contracts of service under which the employer is liable to claims under the Act. Not only is this true with regard to the language of the paragraph, but it is also necessitated by the evident aim and object of the paragraph. It is intended to enable the tribunal to arrive at a proper estimate of the average weekly earnings of the workman for the purpose of measuring the compensation under a contract of service under which an employer is liable. Now assume that a workman is working under two concurrent contracts of service A and B, and that with respect to B he has contracted out

C. A. 1910

BRANDY v. OWNERS OF S.S. RAPHAEL.

Fletcher Moulton L.J.

under a scheme in accordance with s. 3 whereby the benefits in case of accident are decided by some other tribunal or according to some other scale than that which is provided by the Act. This fact protects the employer under contract B, but, inasmuch as it does not prevent B being a contract of service and does not affect in any way the earnings of the workman thereunder, how can we suppose that the existence of such a scheme prevents contract B being a concurrent contract of service, the earnings under which are to be taken into consideration under the provisions of Sched. I., par. 2 (*b*)? The same must be true of a contract with the Crown such as that before us. To my mind both the Crown and the employers of the fireman in the mercantile marine are precisely in the same position as if there existed for firemen in the service of the Crown a scheme under s. 3.

I am therefore of opinion that the learned judge was right in taking into consideration the payment which the seaman received in virtue of his being a member of the Naval Reserve, and that this appeal must be dismissed with costs.

FARWELL L.J. I regret that I am unable to agree with my brethren in this case.

I am of opinion that the effect of s. 9 is to exclude the Crown and persons in the naval or military services of the Crown from the operation of the Act, and that s. 13 must accordingly be read as if the words "other than the Crown" were written into the definition of "employer" and the words "other than persons in the naval or military services of the Crown" were written into the definition of "workman."

Turning next to Sched. I., par. 2, it seems obvious to me that the "workman" and "employer" therein mentioned are the only workmen or employers to whom the Act applies, and that clause (*b*) cannot be read so as to give two different meanings to the words "employer" and "workman" according to the circumstance whether the accident happened while he was in the service of the Crown or of the employer. It is clear that if the accident happened while he was in the service of the Crown he would get no compensation under the Act at all because he

is not a workman nor is the Crown an employer within the meaning of the Act. I fail to see how I can treat Crown and workman as within the Act when the workman is in the employment of another person. Two conditions have to be fulfilled before clause (*b*) has any application. If they are stated in two sentences instead of in one, the matter becomes clear: "If a man being a workman within the Act has entered into a contract of service with an employer within the Act under which he worked at one time for such employer, and the same man being a workman within the Act has entered into another contract with an employer within the Act under which he worked at another time for such second employer, the two contracts being concurrent." Under these words no question arises, and I can see no ground on which the meaning of the words "workman" and "employer" can be varied in such a case so as to make "employer" include the Crown in one but not in the other and "workman" include a man in the naval or military services of the Crown in one case but not in the other.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for respondent: *Windybank, Samuell & Lawrence, for Fox & Bradley, Liverpool.*

H. B. H.

1910

Oct. 25, 26; *Nov.* 22.

[IN THE COURT OF APPEAL.]

SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY (ASSOCIATION OF PRIVATE OWNERS OF RAILWAY ROLLING STOCK, INTERVENERS).

Railway Company—Carriage of Goods—"Reasonable Facilities"—Provision of Truck by Trader—Reduction of Rate where Company does not provide Truck—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Great Western Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxxii.*), *Sched. I., s.* 2 (*b*).

A railway company is under no legal obligation to convey on its railway under all circumstances trucks belonging to a trader and loaded with the trader's goods on payment of tolls based on rates of carriage applicable to such goods alone. But if a railway company fails to provide sufficient trucks for the conveyance of the goods of a particular trader the latter may provide his own trucks, and in that case the provision of motive power for the haulage of the trader's trucks is a reasonable facility for the forwarding and delivering of traffic within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854. The question whether in a given case such provision is a reasonable facility is a question of fact for the Railway and Canal Commission, whose decision is final.

The provision in s. 2 (*b*) of the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, for the reduction of the authorized rate for conveyance where "the company do not provide trucks" in which merchandise is carried on the railway does not apply where, although the company is ready and willing to provide sufficient trucks, the trader prefers to use his own trucks, but only applies to cases where the trader uses his own trucks in order to supplement a deficiency in the supply of trucks by the company.

APPEAL from a decision of the Railway and Canal Commission, reported [1910] 1 K. B. 778.

The original application was made by Spillers & Bakers, Limited, to the Railway and Canal Commissioners sitting as arbitrators upon a difference between the applicants and the defendants, the Great Western Railway Company, under s. 2 (*b*) of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, and there was a cross-application by the defendants.

The applicants were mill owners carrying on a large business at Cardiff. Grain, flour, meal, and offals were conveyed from their mills over the defendants' railway and other railways, about 100 truck loads a day being sent from the applicants' works. Previously to 1904 the applicants had made complaints to the defendants that the number of wagons supplied by the defendants for the purpose of conveying the applicants' merchandise was insufficient. In October, 1904, the applicants decided to provide their own wagons, and they gave an order to a firm of wagon builders for the construction of wagons. These wagons when completed were used by the applicants on the defendants' railway (without prejudice to any claims the defendants might set up). At the date of the hearing of the application the applicants had 300 of their own wagons in use, in addition to wagons belonging to the defendants. The applicants applied to the defendants for a reduction in the authorized rate for conveyance in respect of grain and other merchandise carried in the applicants' wagons, but the defendants refused to make any reduction, and the applicants, contending that a difference had arisen between them and the defendants under s. 2 of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (1), applied

(1) Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), Schedule, s. 2: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for Provided that—

"(*a*) The provision of trucks is not included in the maximum rates applicable to merchandise specified in class A of the classification, and the company shall not be required to provide trucks for the conveyance of such merchandise, or for the conveyance of lime in bulk or salt in bulk, or of the following articles when carried in such a manner as to injure the trucks of the company; that is to say, ammoniacal liquor, creosote, coal tar, gas tar, gas water, or gravel tarred for paving.

"(*b*) Where, for the conveyance of merchandise other than merchandise specified in

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

to the Board of Trade to appoint an arbitrator to determine the difference, and the Board of Trade appointed the Railway and Canal Commissioners to act as arbitrators.

The applicants accordingly applied to that Court to hear and determine the difference, and to determine by what sums the rates for the conveyance of grain, flour, meal, and offals should be reduced in respect that the defendants did not provide trucks for the same.

The defendants by their answer alleged that they were able and willing to provide trucks for the whole of the applicants' merchandise, and they filed a cross-application under s. 10 of the Railway and Canal Traffic Act, 1888, asking for a declaration that the defendants were not bound to carry or convey the merchandise of the applicants in trucks provided by the applicants, and that the rates charged or sought to be charged were legal.

The Association of Private Owners of Railway Rolling Stock obtained leave to intervene as parties interested.

When the case originally came on for hearing the Commissioners were asked first to decide the question whether the words "rate authorized for conveyance" in s. 2 of the schedule to the Act of 1891 meant the actual rate in force, as the applicants contended, or the maximum rate which the defendants were authorized to charge. The Commissioners decided this

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class A of the classification, the company do not provide trucks, the rate authorized for conveyance shall be reduced by a sum, which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade, and for distances exceeding fifty miles, shall be the charge authorized to be made by the company for the provision of trucks when not included in the maximum rate for conveyance."

Sect. 9 contains a scale of charges for the use of trucks provided by the company for the conveyance of merchandise when the provision of trucks is not included in the maximum rate for conveyance.

Sect. 23: "Where merchandise is conveyed in a trader's truck, the company shall not make any charge in respect of the return of the truck empty . . . ."

question in favour of the applicants' contention, and their decision was affirmed by the Court of Appeal. (1)

At the resumed hearing before the Railway and Canal Commission evidence was called the effect of which is stated in the judgment of that Court. The Court found that the defendants were under no legal obligation to convey the applicants' loaded trucks under all circumstances, but that if the defendants failed to supply sufficient trucks for the conveyance of the applicants' merchandise the latter might supply their own trucks, in which case the provision of motive power for the haulage of the applicants' trucks would be a "reasonable facility" for their forwarding within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854. (2) They further held that s. 2 (*b*) of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, did not apply where, although the railway company was ready and willing to provide trucks, the trader preferred to use, and did use, his own trucks, but only where the trader used his own trucks to supplement a deficiency in the supply of trucks by the company.

The operative part of the order of the Railway and Canal Commission (the recitals being here omitted) was as follows: "Now therefore . . . . this Court doth find and determine that the Great Western Company except in times of great stress provide sufficient sheeted trucks for the conveyance of Messieurs Spillers' said merchandise and that such trucks are suitable for such traffic: And doth declare that the Great Western Company are not bound as a reasonable facility to carry or convey the said merchandise in the vans provided by Messieurs Spillers except as hereinafter mentioned: But this Court doth further find and determine that the Great Western Company have not in the past always provided sufficient vans or sheeted trucks for

(1) See [1909] 1 K. B. 604.

(2) By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles . . . ."

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

the said merchandise of Messieurs Spillers although Messieurs Spillers and their customers desired covered vans to be provided: And this Court doth further declare that the Great Western Company are bound as a reasonable facility to carry and convey the said merchandise for Messieurs Spillers in the vans already provided by Messieurs Spillers when the Great Western Company fail to provide sufficient vans: And this Court doth order and enjoin the Great Western Company when they fail to provide sufficient vans to afford the said reasonable facility for the receiving and forwarding and delivering of Messieurs Spillers' merchandise in the vans already provided by Messieurs Spillers: And it is further ordered that Messieurs Spillers and the Great Western Company or either of them have liberty to apply to this Court to determine by what sums the rates for the conveyance of Messieurs Spillers' said traffic shall be reduced when the Great Western Company fail to provide sufficient vans and also with reference to the said sum of 569*l.* (1) and also have liberty to apply for the purpose of carrying this Order into effect as they or either of them may be advised."

The applicants appealed and their appeal was heard before the Full Court of Appeal. A cross-appeal by the railway company was not opened at the hearing and was treated as abandoned.

Oct. 25. *Balfour Browne, K.C.*, and *C. A. Russell, K.C.* (*Rowland Whitehead* with them), for the appellants.

Sir Alfred Cripps, K.C., and *Ernest Page, K.C.* (*Harold Russell* with them), for the respondents.

Bailhache, K.C., and *Holman Gregory*, for the interveners. (2)

The arguments were identical with those urged before the Railway and Canal Commission, which are set out in considerable detail in the report in [1910] 1 K. B. at pp. 781—785; it is considered unnecessary to repeat them in this report. The following statutes and authorities were cited:—Railways Clauses

(1) This sum was a deduction made by the applicants from the carriage accounts of the defendants.

(2) The Court of Appeal, having heard two counsel on behalf of the applicants, declined, in accordance with its usual practice, to hear a third counsel; no separate argument was therefore urged on behalf of the interveners.

Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 3, 4, 5, 86, 87, 89, 90, 91, 92, 94, 95, 97, 98, 99, 102, 103, 104, 105, 108, 117, 118, 121, 122; South Wales Railway Consolidation Act, 1855 (18 & 19 Vict. c. xcviii.); Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2; Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), schedule; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), ss. 3, 6, 14; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 25, 55; Great Western Railway (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), Sched. I., ss. 2, 9, 23: Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19), s. 2; *Dickson* v. *Great Northern Railway* (1); *Harrison & Camm* v. *Midland Railway* (2); *Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Railway* (3); *Midland Railway* v. *Myers, Rose & Co.* (4); *Johnson* v. *Midland Railway* (5); *Hare* v. *London and North Western Railway* (6); *Perth General Station Committee* v. *Ross* (7); *South Eastern Railway* v. *Railway Commissioners* (8); *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway* (9); *Pickering Phipps* v. *London and North Western Railway* (10); *Barret* v. *Great Northern Railway* (11); *Ransome* v. *Eastern Counties Railway* (12); *Darlaston Local Board* v. *London and North Western Railway.* (13)

Cur. adv. vult.

Nov. 22. COZENS-HARDY M.R. read the following judgment:— This appeal raises, so far as I am aware for the first time, a very important question as to the nature and extent of the obligations of a railway company towards traders desirous of using their own rolling stock loaded with merchandise for the purpose of having such merchandise carried by a railway

(1) (1886) 18 Q. B. D. 176.
(2) (1893) 8 Ry. & Ca. Tr. Cas. 60.
(3) [1902] 1 K. B. 651.
(4) [1909] A. C. 13.
(5) (1849) 4 Ex. 367.
(6) (1861) 2 J. & H. 80; 30 L. J. (Ch.) 817.
(7) [1897] A. C. 479.
(8) (1881) 6 Q. B. D. 586, at p. 592.
(9) (1880) 3 Ry. & Ca. Tr. Cas. 426, at p. 441.
(10) [1892] 2 Q. B. 229, at p. 237.
(11) (1857) 1 C. B. (N.S.) 423; 26 L. J. (C.P.) 83.
(12) (1857) 1 C. B. (N.S.) 437; 26 L. J. (C.P.) 91.
(13) [1894] 2 Q. B. 694, at p. 703.

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Cozens-Hardy M.R.

company upon the terms of payment of the proper rates for such merchandise.

The Act of 1845 was passed in the early days when it was thought that a railway could be regarded as a highway along which members of the public might run their own engines and carriages, paying toll to the company. This was soon discovered to be impracticable for the simple reason that points and signals must be worked by the company's servants to secure safety. The Act also treated the railway company as common carriers of merchandise in so far as they elected to act as such. I can find nothing which imposes any obligation upon the railway company to supply rolling stock to meet the requirements of traders. A common carrier is only bound to carry goods if his cart or carriage will hold them. He is not bound to get a second cart or carriage: *Riley* v. *Horne*. (1) It was probably thought, and with reason, that this might safely be left to the pecuniary interest of the company. Nor can I find anything which directly deals with the duties of the company towards traders who wish to use their own rolling stock. In my opinion no action could be maintained, apart from subsequent legislation, against a railway company for not receiving and forwarding merchandise in owners' trucks.

The Act of 1854 effected a great change. It imposed upon the railway company a new duty, namely, the duty of affording all reasonable facilities for receiving and forwarding and delivering of "traffic" upon and from its railway, and for the return of carriages and trucks. But this duty could only be enforced by an application to a body, now the Railway Commissioners. It is for them to say what, in the particular case, are "reasonable facilities." Their finding on this point is a finding of fact, and no appeal lies to this Court (s. 17 of the Act of 1888) unless they have, to use a common phrase, misdirected themselves as to the law.

Now there is nothing in the Act of 1854 which entitles a trader, as a matter of right, to have his goods carried in any particular way. "Reasonable facilities" are all that he can claim, and what are "reasonable facilities" must be determined

(1) (1828) 5 Bing. 217.

by the Railway Commissioners. I have not forgotten that the definition of "traffic" includes carriages, &c., adapted for running or passing over the railway. The company must afford facilities for conveying a truck or van, as a separate article, on payment of a reasonable rate for such conveyance. But I am not prepared to say that this entitles a trader to have his loaded wagon forwarded, as a means of forwarding the goods contained in the wagon, upon payment of tolls based upon the rates applicable to such goods, either with or without abatement.

It is common knowledge, and it is fully recognized by the Act of 1891, that for some kinds of traffic, especially for coal and other mineral traffic, wagons owned or hired by traders are very largely used; and I conceive that any attempt by the railway company to interfere with this practice would not meet with the approval of the Railway Commissioners if they had to consider the question of "reasonable facilities."

The Act of 1891, dealing with the Great Western Railway alone, does not really alter the position. It recognizes the practice not to supply wagons for mineral traffic, and expressly enacts that the company shall not be required to provide wagons for that traffic, so that it would not be competent to the Railway Commissioners to order such wagons to be provided as a reasonable facility. But this negative enactment does not import a positive obligation as to all traffic other than mineral. The Act contains provisions to the effect that when the company does not provide wagons there is either a reduced rate or a means of obtaining a reduction or rebate from the authorized rate.

It remains to consider the particular circumstances of the present case. The appellants are large millers and dealers in grain and flour at Cardiff. Their premises adjoin a dock at Cardiff. By virtue of some arrangement, the details of which are not stated, the Cardiff Railway Company haul loaded trucks or vans from the appellants' premises to the sidings of the Great Western Railway—a distance of upwards of a mile—for transmission to various points on the Great Western Railway Company's system, or to points beyond. The appellants complain that the Great Western Railway Company have not sent sufficient trucks or vans, and in particular not sufficient vans,

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Cozens-Hardy M.R.

for their requirements. They therefore purchased a large number of covered vans, and they assert their right to have these vans, loaded with grain or flour, received and forwarded by the Great Western Railway, and to have a reduction or abatement from the rates which admittedly would be payable if the company's own vans were used. The principle upon which the reduction or abatement (if any) is to be made has been laid down by this Court. (1)

The Railway Commissioners have held that, except in times of great stress, there has been no shortage of sheeted wagons, and that such wagons are suitable for carriage of grain and flour, and that it is not a "reasonable facility" to have owners' vans used when the company is ready and willing to provide suitable trucks or vans. We cannot interfere with these findings of fact, for there was no misdirection. The Commissioners were entitled, and indeed bound, to have regard to the interest of the railway company as well as of the traders. In my opinion upon these findings the order of the Commissioners is substantially right, although in form it is open to objection. I think the order should be altered as follows: This Court doth find and determine (1.) That the Great Western Railway Company are bound, as a reasonable facility, to carry or convey Messrs. Spillers & Bakers' merchandise in covered vans or other suitable vehicles provided by them whenever a sufficient number of suitable vehicles are not from time to time provided by the railway company for the purpose, but that except as aforesaid the railway company are not so bound. (2.) That both sheeted trucks and covered vans are suitable vehicles for the conveyance of Messrs. Spillers & Bakers' merchandise. Probably these declarations will enable the parties to agree the figures, but there may be added (3.) Liberty to apply as to the times when a sufficient number of suitable vehicles have not been provided by the Great Western Railway Company, and as to the sums by which the rates charged by the company for the conveyance of goods on these occasions ought to be reduced, and also as to the sum of 569*l*.

The cross-appeal by the railway company was not opened;

(1) See [1909] 1 K. B. 604.

it must be dismissed. There should be no costs of either appeal.

Lord Justice Vaughan Williams has read this judgment and he desires me to say that he agrees with it.

FLETCHER MOULTON L.J. read the following judgment:—The point for our decision in the present appeal is a very short one, and to my mind the reasoning which leads to the correct conclusion is simple. The appellants, Messrs. Spillers & Bakers, Limited, are corn merchants, and desire to forward their corn and flour over the railway of the respondents, the Great Western Railway Company. That company does not contest that they have a right to do so, for it is a railway company holding itself out as a common carrier under the powers given by the Railways Clauses Consolidation Act, 1845; and, moreover, by reason of the provisions of the Railway and Canal Traffic Act, 1854, and subsequent railway Acts, it is bound to afford reasonable facilities to all traffic, which, of course, must include merchandise tendered to it for carriage by the appellants. Moreover, no question arises as to the willingness of the Great Western Railway Company to convey the merchandise. It is true that at certain moments of stress (as, for instance, at times during the South African war) it has failed to supply a sufficient amount of suitable trucks to carry the whole of the merchandise of the appellants; but those occasions were exceptional, and the rights to which they give rise will be noticed later on. In general it has furnished trucks which the Railway Commissioners have found to be suitable, and to have been supplied in numbers adequate to convey the whole of the merchandise of the appellants. But the appellants insist that the merchandise shall be forwarded in their own trucks and not in the trucks so supplied. Whether they are entitled so to do is the question for our decision.

The obligations upon the Great Western Railway Company in this behalf must come from one or both of two sources, namely, its obligations as a common carrier, or its obligation to grant reasonable facilities for traffic under the Act of 1854, and the subsequent Acts which impose that obligation. It is conceded that there is no obligation upon it in its character of common carrier

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Fletcher Moulton L.J.

to haul other people's trucks. As a common carrier it may decide for itself in what way it will convey goods. The only question, therefore, that remains is whether the carriage of the goods in the appellants' own wagons is a reasonable facility in respect of the conveyance of those goods. This is a question of fact and has been decided against the appellants by the Railway Commissioners. That Court is a final Court in matters of fact, and, therefore, its decision on the point is binding upon us. Since, therefore, there is no obligation on the Great Western Railway, either as a common carrier or as a railway company bound to grant reasonable facilities for the conveyance of the appellants' goods, to convey them in the appellants' own trucks, the appeal fails.

But I should, in my opinion, be falling short of my duty if, in addition to giving this my decision and this course of reasoning, which in my opinion is sufficient to support it, I did not deal with the extremely able and ingenious argument which was put before us on behalf of the appellants, and point out what in my opinion are the fallacies that lurk within it.

This argument, as presented by counsel for the appellants, has a plausible ring. I pass over the part that was elaborated by Mr. Balfour Browne, based on the Act of 1845, because I think it clear that the provisions of that Act are irrelevant to the decision of the case before us. It was passed at a time when both the public and the Legislature conceived that the utilization of railways by the general public would resemble their use of public highways; so that members of the public desirous of availing themselves of railway communication would run their own vehicles on the lines as they do on public highways. Subsequent experience has demonstrated the impracticability of any such mode of user; and the very conception of it has become obsolete. It is only useful to refer to it here because it explains the presence in the Act of 1845 of elaborate clauses dealing with the rights of persons who thus use the railway tracks upon payment of tolls. It is needless to say that no such user is contemplated by the appellants. But the Act of 1845 imposes no duties upon railway companies in respect of such user other than that they should permit it. So far as that Act is concerned,

railway companies have no obligations either to haul or to carry. But while not imposing any duties on the railway companies with regard to the reception or forwarding of traffic, it gave them powers to carry on business as common carriers, of which they have since universally availed themselves. In this their character of common carriers it is, as I have said, conceded that they are not compellable to haul trucks belonging to other people; so that, from all points of view, the provisions of the Act of 1845 are immaterial to the decision in the present case.

The substantial part of the argument on behalf of the appellants is based on the Act of 1854 and the subsequent Acts which carry out and develop the policy initiated by it. These Acts consistently follow on the lines laid down by s. 2 of the Act of 1854, coupled with the definition of traffic in that Act. They introduce no modifications (save as to the Court to which disputes are referred) which affect the issue before us; so that in this judgment I shall refer only to the original Act of 1854. Sect. 2 of that Act imposes upon railway companies the duty of giving reasonable facilities for all traffic as therein defined. The definition of "traffic" is so important that I will quote it in full: "The word 'traffic' shall include not only passengers, and their luggage, and goods, animals, and other things conveyed by any railway company or canal company or railway and canal company, but also carriages, wagons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company." It is therefore evident that any member of the public, who has a vehicle proper to run on railway lines, can claim reasonable facilities for its being conveyed by the railway company; and this, to my mind, unquestionably includes haulage of that vehicle.

The appellants' counsel thereupon argues thus: The appellants vans, whether loaded or unloaded, are admittedly vehicles proper to pass over the railway lines. These vehicles, therefore, come under the definition of "traffic" in the Act of 1854, and the appellants, therefore, have the right to require the railway company to grant reasonable facilities for the conveyance of them; which, as I have said, obviously includes haulage. The

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Fletcher Moulton L.J.

appellants, therefore, have a right to have their loaded vans hauled by the railway company: Q. E. D.

To realize the fallacy of this argument it is necessary to keep clearly in mind that s. 2 of the Act of 1854 relates solely to the obligations which rest upon railway companies to perform services, and does not deal in any way with the terms on which those services are to be performed. There runs, no doubt, throughout the section the implication that services demanded from railway companies thereunder will be paid for by the person requiring them to be performed. But nothing is said as to how, or according to what scale, such payments will be made. For all these matters we have to look elsewhere; and since the Orders of 1891 came into force the provisions which regulate them are contained in the Orders of that date.

Now I have no doubt that any one who tenders to the railway company a vehicle so constructed as to be fitted to be run on the lines is entitled to call it traffic, and to require the railway company to give reasonable facilities for its conveyance to whatever place he may choose, provided he is willing to make the prescribed payment for the service rendered. For instance, if a company builds Pullman cars at Southampton and wishes to deliver them to the Caledonian Railway Company in Glasgow, I have no doubt that it can require the railway companies to convey the Pullman cars to their destination on paying a reasonable rate, determined under Part IV. (Exceptional Class) of the Order of 1891. I am also of opinion that the trader can require the company to afford reasonable facilities for the return of the vehicle so conveyed if he is prepared to make a like payment for their so doing. The same is true of any person who tenders goods to be conveyed by the railway and is willing to pay the prescribed price for the conveyance of those goods. But that for which I can find no warrant, either in the Act of 1854 or elsewhere, is the suggestion that the customer can put the goods into the car and require the company to do all these services for a payment less in amount than that for the goods alone.

This is in truth the proposition which the appellants must maintain in order to succeed in the appeal. They have no intention of paying for the haulage of the car as traffic. They claim

to pay only for the conveyance of the goods, and thus are in the position of treating the goods as the only traffic which they call on the railway company to carry, and for which, accordingly, they must pay the freight. The haulage of the car they claim as a particular mode in which the conveyance of the goods is to be performed; not as a piece of "traffic" independently tendered as such and independently to be paid for. They treat the car as a thing the conveyance of which is an incident in the conveyance of the goods, and, therefore, their claim is to a choice of the method by which the duty of conveying the goods shall be performed by the railway company. I turn to s. 2 of the Act of 1854 to find whether there is any warrant for this claim on the part of the customer to choose the mode in which the railway company shall perform its duty of conveyance, and I find that the only right of this type which is given to the customer is that he may require the railway company to grant reasonable facilities for the conveyance of the traffic tendered. In order, therefore, to support their claim that their traffic shall be conveyed in this particular way, the appellants must shew that it is a reasonable facility that the corn and flour should be conveyed in their own trucks. This is a question of fact, and the Railway Commissioners have decided it against them, and with that their claim fails.

Inasmuch as the appellants have no right to interfere with the mode in which the Great Western Railway Company choose to carry their merchandise provided that they perform their duty in granting reasonable facilities, it is not material to refer to the Provisional Order of 1891 which prescribes the maximum rates to be charged. The language of that Order shews that its object is to fix charges and not to alter the obligations of the railway company in respect of granting reasonable facilities, and, so far as my examination goes, I cannot find that there is any alteration of such obligations, excepting that in s. 2 (*a*) it is definitely enacted that the company shall not be required to provide trucks for the conveyance of merchandise in class A and of certain other articles there enumerated. This may possibly be a limitation of their obligation to provide reasonable facilities for the carriage of such traffic, or it may be regarded as a statutory declaration that the providing of trucks

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Fletcher Moulton L.J.

for such merchandise is not included in the term "reasonable facilities." With this possible exception, the provisions relate solely to the terms on which merchandise must be conveyed, and inasmuch as the Great Western Railway Company was willing to convey the merchandise in a proper manner and at proper rates, no question arises on the provisions of the Order. Its offer to convey the merchandise in the manner desired by the customers at the same rate as it would have conveyed it in its own trucks was obviously an offer which it was not bound to make and which the customers were free to refuse, and on such refusal the parties were relegated to their legal rights as though the offer had not been made.

It remains to consider the consequences of the occasional failures on the part of the Great Western Railway Company to provide sufficient suitable trucks. The Court may well hold that its obligation to provide reasonable facilities would in such cases oblige it to convey the merchandise in the trader's trucks if so requested. This is the view that has been taken by the Railway Commissioners in the present case, and as it is a question of fact there is no appeal from their decision, which, I may add, was in my opinion perfectly right. What the pecuniary consequences of this will be by reason of what has occurred in the past or what may occur in the future is not a matter with which we have to deal.

But although in substance the order in my opinion is correct, the phraseology used is undoubtedly defective, and I think that the order should be amended in accordance with the judgment of the Master of the Rolls.

FARWELL L.J. read the following judgment:—I am of opinion that Messrs. Spillers' appeal fails. The first fallacy in their argument is that they treat the liability of the company to carry goods and to forward trucks as identical; but the liability to carry goods attaches to them as common carriers under s. 89 of the Railways Clauses Act, 1845: that Act imposed no obligation on them to forward other persons' loaded trucks at all: an action at common law would lie against a company as common carriers for refusing without just cause (such as want of room)

to carry goods according to their profession, but no such action would lie for not despatching the plaintiffs' trucks. Mr. Balfour Browne relied on s. 92, but that section refers to the use, which in 1845 was supposed to be possible, of the railroad by other companies and persons with their own "engines and carriages," treating the railway as if it were a common highway, and gives no support whatever to his contention that the company, who under that Act were merely common carriers, could be compelled not to carry but to find locomotive power for trucks containing the consignor's goods. This liability of railway companies was enlarged in 1854, not, however, by imposing on them a direct obligation to forward trucks, but by obliging them to provide reasonable facilities for forwarding and returning traffic, which by the definition clause includes trucks and goods and passengers, and by creating a statutory tribunal charged with the duty of determining what are reasonable facilities: this Court cannot undertake such duty, nor is there any appeal to this Court on any question of fact.

The second fallacy in the appellants' argument therefore is that they read the 2nd section of the Railway and Canal Traffic Act, 1854, as giving them an absolute right to have their traffic, including trucks, forwarded. On the true construction of that Act, their only right, in respect of their trucks, is to have such facilities for forwarding traffic as the Railway Commissioners may determine to be reasonable. An action would lie against the company for damages for failing to supply the facilities ordered by the Commissioners as reasonable, but no action would lie for damages for failure to forward trucks without such an order. The company are not liable at common law, and therefore (to use Lord Watson's words in *Perth General Station Committee* v. *Ross* (1)) Courts of law "can only deal with legal rights as they exist, and not with rights as they possibly might have existed if the Railway Commissioners had been applied to and had affirmed their existence." Then it is said that the Railway Commissioners are bound to order these facilities, because the word "traffic" includes goods, passengers, and trucks. But the Act does not give the right to the traders to have trucks and

(1) [1897] A. C. 479, at p. 487.

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Farwell L.J.

goods sent together; that is for the Commissioners to decide, and the Commissioners in considering any application for facilities would of course regard the reasonableness of sending the goods packed in the trader's own trucks or in the company's. The trader's right to have reasonable facilities for the despatch of his goods and also of his truck does not preclude the Commissioners from considering whether it is reasonable that the goods should be sent packed in the trader's truck. The question of reasonableness is one of fact and necessarily depends on the circumstances of the case, but in my opinion the Commissioners are not confined to the consideration of the convenience of the trader in a particular case, but may take into consideration the interests of the company as well as of the trader, the question of comparative cost and convenience, and the effect of the facilities sought for on other traders and the public using the line. I fail to see anything that can be called a mistake in law in the findings of fact in the present case in this respect.

The next question arises on the construction of the Act of 1891. It is said that the Commissioners have nothing to do but find whether the company have in fact provided the trucks used. I do not agree. The words "provide trucks" (not *the* trucks) in my opinion refer to the condition of being ready and willing, not to the actual fact. A steamship company "provides" and is paid for meals for its passengers, although circumstances may prevent all or some of them from eating them; and a consideration of the circumstances convinces me that this is the proper view. If a trader desires facilities for forwarding his goods, and the railway company have not sufficient trucks, the Commissioners would order the company to provide trucks sufficient for the purpose; if they have sufficient already, the application would fail. Here the application is to give facilities for forwarding both goods and trucks; the company shew that they have ample trucks to forward the goods, and are willing to forward the trucks as trucks; the question is still the same: Is it reasonable to compel a company who have ample trucks to use others? The question is one of fact and not appealable, and I can see no reason for interfering with the finding that it is reasonable only when the company have no proper trucks of their own

ready for use. It is said that the decision in *Harrison & Camm* v. *Midland Railway* (1) is opposed to this. I read that case as being a decision only on the special Act in that case. If the proposition at p. 65, "So long as he (the trader) tenders them in proper vehicles he is entitled to have goods conveyed in those vehicles to the point of destination," was intended to lay down a general proposition of law, as Mr. Balfour Browne contended, I think that it is untenable.

I have read the form of order proposed by the Master of the Rolls and agree with it.

BUCKLEY L.J. (2). At the outset I am desirous of bringing within their true limits the questions which here arise for decision. First we have heard an argument that if a trader loads his goods in his own truck, being a proper truck for haulage on the railway, and requires the railway company to haul it, they are bound so to do. This question does not arise. The company have not refused to haul the trader's truck containing the trader's goods. On the contrary they have received and hauled the trucks, maintaining, however, that the payment to be made for that service must be the same as if the goods had been laden in the company's truck. Secondly, no one before us disputes that under circumstances the railway company can be called upon to haul the trader's truck containing the trader's goods, indeed the order under appeal affirms that the company are bound under circumstances so to do, and there is no cross-appeal by the railway company upon this point. The questions which do arise are two, namely, first, whether upon the facts found by the Commissioners the railway company are bound under s. 2 of the Act of 1854 to give as a reasonable facility, and as a matter of right, haulage to the trader's truck when the circumstances are that the railway company maintains a sufficient staff of proper trucks for the service and offers them for the trader's use; and, secondly, whether, when the facts are that the company maintains and offers for use suitable trucks, but the trader uses not the company's trucks but his own, "the company"

(1) 8 Ry. & Ca. Tr. Cas. 60.
(2) The judgment was read by Farwell L.J.

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Buckley L.J.

within the language of s. 2 (*b*) of the Order of 1891 "do not provide trucks," with the result that the rate authorized for conveyance is to be reduced.

Upon the first of these two questions the contention of the appellants is that, notwithstanding that the railway company have maintained and offer for use a proper truck, the trader is entitled to say "Haul my truck upon the terms that I am only to pay you a reduced rate." This argument has been based upon sections in the Acts which provide that traffic is to include trucks, from which the appellants evolve as matter of argument that if a truck and its contents are offered both the one and the other are within the word "traffic" and the company is bound to convey them. I think this argument rests upon a fallacy. If a manufacturer in Birmingham has there manufactured for a purchaser at Cardiff railway trucks and is desirous of sending them to Cardiff, I have no doubt that the railway company can be compelled to haul those trucks as traffic. That is a case in which the owner of the goods, namely, the truck, desires to have it conveyed from one place to another in order that the truck as a truck may as matter of transport or change of the position of the truck cease to be at Birmingham and be delivered at Cardiff. But this is not true where the truck is not sent for the purpose of conveyance (meaning thereby alteration of the position) of the truck as a truck, but is sent as a vehicle for the purpose of conveyance—that is to say, alteration of the position—of something else, namely, the contents of the truck. The truck where employed as a vehicle is sent not for conveyance of the truck, but for conveyance of its contents. The haulage of the truck is only a means to an end. The trader does not want the truck conveyed. So far as the truck is concerned he would be content that it should stay where it is, and when he has sent it away he wants it returned. The real subject-matter of conveyance is not the truck, but its contents. Under s. 2 of the Act of 1854 the company are bound to afford reasonable facilities for receiving, forwarding, and delivering traffic, but it is a question of fact whether in a case where the company maintains a sufficient staff of trucks for the particular service and offers them for use it is or is not affording all reasonable facilities for receiving,

forwarding, and delivering goods intended to be sent in trucks by offering to carry them in the railway company's trucks as distinguished from the trader's trucks. The appellants' contention that they are entitled to a declaration that the railway company are at all times bound to afford reasonable facilities for receiving, hauling, forwarding, and delivering loaded and unloaded trucks of the appellants cannot, I think, be maintained.

The second question arises upon s. 2 (*b*) of the Order of 1891 and turns upon the meaning of the words "the company do not provide trucks." The expression here used is not "the company do not provide *the* trucks," that is to say, "do not provide the trucks in which the goods are laden," but is "the company do not provide trucks." In my opinion this means where the company do not maintain and offer for use trucks appropriate for the service required. The appellants seek to read the words as if they were "where the trader does not use trucks provided by the company." Those are not the words, and that is not, I think, the meaning of the words. Sect. 2 deals with two cases. First sub-s. (*a*), the case in which the company is not required to provide trucks; in this case an addition is to be made to the maximum if the company, not being required so to do, does in fact provide the truck; and secondly sub-s. (*b*), the case in which the company as regards merchandise not specified in class A does not provide trucks; in this case a deduction is to be made in respect of their not providing that service. The order under appeal by the liberty to apply infers, but does not affirmatively determine, that in certain named circumstances a reduction is to be allowed. There ought, I think, to be a declaration to that effect. The previous decision of this Court (1), to which the Master of the Rolls has referred, does not, I think, determine the circumstances under which reduction is to be made, but determines only how the reduction (assuming that there is to be a reduction) is to be computed.

The order under appeal must be considered under two heads—first, so far as it is a determination of facts which this Court cannot review, and, secondly, so far as it contains declarations of rights. There are two determinations of fact. The first is

(1) [1909] 1 K. B. 604.

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Buckley L.J.

that the railway company, except in times of great stress, provide sufficient sheeted trucks for the conveyance of Messrs. Spillers' merchandise and that such trucks are suitable for such traffic. The language of this declaration is unfortunate, but its meaning, I think, is that the company, except in times of stress, provide sufficient suitable trucks, and that sheeted trucks are suitable. The second declaration contains in the words "although Messrs. Spillers and their customers desired covered vans to be provided" an expression not relevant so far as I see to the matter to be determined, and not appropriate to the context. Those words I put on one side. Apart from those words, I understand this declaration to mean that the company have not in the past always provided sufficient suitable trucks for the appellants' merchandise. These being the findings of fact, I think there should be substituted for the declarations in the order under appeal declarations to the effect which the Master of the Rolls has stated. There ought also, in my judgment, to be a declaration that in the case where the company under the aforesaid declarations are bound to receive, forward, and deliver the merchandise in the appellants' trucks, the rate authorized for conveyance is to be reduced by a sum as to which either party is to be at liberty to apply, and, lastly, the company should be enjoined, when they fail to provide sufficient suitable trucks, to afford reasonable facilities for receiving, forwarding, and delivering the appellants' merchandise in suitable trucks provided or to be provided by the appellants. This is in substance to refuse the appeal and allow the cross-appeal, although the cross-appeal was never in fact opened.

KENNEDY L.J. (1) This appeal raises, no doubt, a question of some commercial importance, but not, I think, of serious legal difficulty. The appellants, who are millers and corn merchants at Cardiff and elsewhere, contend that the respondents are not affording them reasonable facilities at Cardiff for the receiving and forwarding and delivering of traffic upon the respondents' railway within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854. The appellants claim a declaration that under that section the railway company is at all times bound to

(1) The judgment was read by Fletcher Moulton L.J.

receive, forward, and deliver grain and flour loaded upon the appellants' own vans. The respondents contend that the statutory reasonable facilities do not include the right to conveyance (in which single word I summarize "receiving, forwarding, and delivering") of such merchandise laden in the appellants' own vehicles if and when the respondents are themselves ready and willing to provide the appellants with suitable vehicles for its conveyance. There is also a minor and supplemental dispute between the parties as to the charge to be made by the respondents in the case of the conveyance of the appellants' grain and flour in the appellants' own vehicles under the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. There is, thirdly, a question as to the correctness of the wording of the order of the Railway and Canal Commissioners as it has been drawn up. But the main subject of dispute for our consideration is that which I have put first, namely, the right claimed by the appellants to have their own vans, laden with grain or flour, received by the respondents and hauled along the respondents' railway to their destination although the respondents are ready and willing to supply suitable vehicles for the carriage of such merchandise.

The Court of the Railway and Canal Commission, after a lengthy hearing of evidence and argument, has held, for reasons set forth in the judgment of A. T. Lawrence J. which entirely commended themselves to his colleagues, and which, speaking for myself, I deem sound and sufficient, that whilst it is true that on some occasions in the past the respondents have failed to provide a sufficient number of suitable wagons for the carriage of the appellants' merchandise, and that, whenever such failure occurs, the respondents are bound to carry the appellants' merchandise in the appellants' own vehicles, the unqualified requirement of the appellants is altogether in excess of the right to "reasonable facilities" which have been given to the trader by the Railway and Canal Traffic Act, 1854, s. 2. It is needless for me to restate the grounds of this decision. What is the objection to it which the appellants have endeavoured to make good on this appeal? It appears to me that in substance it is this: The Court of the Railway and Canal Commission has

C. A. 1910

SPILLERS & BAKERS, LIMITED v. GREAT WESTERN RAILWAY.

Kennedy L.J.

gone wrong because (say the appellants) it has considered the question of "reasonable facilities" in relation to the receiving, forwarding, and delivering of the appellants' merchandise and not in relation to the receiving, forwarding, and delivering of the appellants' loaded vans. "That," say the appellants, "for which we are asking is that the respondents should afford us reasonable facilities for receiving, forwarding, and delivering the trader's loaded vans, and it is no answer to this claim to prove that the railway company affords us reasonable facilities for receiving, forwarding, and delivering merchandise. The two cases are distinct, and a different set of considerations may apply to each."

I am unable to accept this reasoning; it appears to me to involve a fallacy. No one disputes that a vehicle, whether fitted to run on a railway or not, and whether laden or empty, may be "traffic" within the Railway and Canal Traffic Act, 1854, s. 2. It is such "traffic" when it is conveyed by the railway company, either by haulage or by carriage, for reward to the company as carriers of that vehicle. But in the present case it is not as such articles of traffic that Spillers & Bakers, Limited, are asking the railway company to take and transport these loaded vans. The respondents, if they accept these vans, can make no charge for any services in respect of their transport along their railway. On the contrary, according to the appellants' contention, under the Act of 1891 the fact of the conveyance of this grain and flour in the appellants' own vans on the respondents' railway entitles the appellants to a deduction from the ordinary charge for the conveyance by the respondents of such merchandise. Really and truly, in such a case as this, it is the merchandise which constitutes the "traffic," and if, as the appellants assert, A. T. Lawrence J. and his colleagues treated the question of "reasonable facilities" from this point of view, and so decided against the appellants' unlimited claim that the railway company must, as a "reasonable facility," carry that merchandise in the owners' vans although it has itself provided and is ready and willing to supply suitable vehicles of its own for the carriage of the goods, it appears to me that the Court proceeded upon proper and legitimate grounds for the decision at which it arrived.

As to the other points in the case, and the question of costs, I do not desire to add anything to the judgment of the Master of the Rolls, which I have had an opportunity of considering, and in which I concur.

COZENS-HARDY M.R. We think it better not to insert the declaration suggested by Buckley L.J. as to the reduction of rates. This is a matter which was dealt with by this Court in the earlier appeal. We do not anticipate that any difficulty will arise on this point. It is not usual to grant a contingent injunction. Liberty to apply in case of difficulty will sufficiently protect the appellants.

Appeal dismissed.

Solicitors for appellants: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for interveners: *Willis & Willis, for Taynton, Sons & Siveter, Gloucester.*

Solicitor for respondents: *L. B. Page.*

W. J. B.

Distinguished. *Re* BARNATO (*decd.*) [1948] 2 All E.R. 585.

Distinguished. *Re* BARNATO (*decd.*). [1949] 1 All E.R. 515.

Distinguished. *Re* BARNATO. [1949] 1 Ch. 21

Distinguished. *Re* BARNATO. [1949] 1 Ch. 258

C. A.

1910

Nov. 28 ; *Dec.* 10.

[IN THE COURT OF APPEAL.]

DYSON *v.* ATTORNEY-GENERAL.

Practice—Striking out Pleadings—Reasonable Cause of Action—Relief against the Crown—Declaratory Judgment—Attorney-General Defendant—Action or Petition of Right—Rules of Supreme Court, 1883, *Order* XXV., *rr.* 4, 5—*Finance* (1909-1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *Form IV.*

Order XXV., r. 4,—which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action—was never intended to apply to any pleading which raises a question of general importance, or serious question of law.

The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff.

Hodge v. *Attorney-General*, (1839) 3 Y. & C. Ex. 342, examined and approved.

A declaratory judgment can, under Order XXV., r. 5, be made against the Attorney-General, as defendant representing the Crown, and a plaintiff is not bound in such a case to proceed by petition of right.

APPEAL from a decision of Lush J. in chambers.

This action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, and commonly known as Form IV. The main question argued was whether the Attorney-General could properly be made a defendant to an action of this nature.

The plaintiff's statement of claim was (so far as material) as follows :—

The plaintiff is the owner and occupier of (*a*) a house and premises with gardens, orchards, and agricultural land of some thirty acres attached, and (*b*) also of some forty acres of agricultural land with a farmhouse and buildings on it, situate in the parish of Weeton, in the county of York.

On August 9 last Form IV., dated August 4, was left on the plaintiff's premises, requiring the occupier to deliver the returns to "the appointed officer, Hugh Bateson, Kirby Overblow, Gannall, S.O.," within thirty days from the date of the notice,

i.e., from August 4, 1910, under a penalty in the event of failure not exceeding 50*l*. On September 20 last the plaintiff commenced this action against the Attorney-General, and on October 15 delivered a statement of claim in which he made the following allegations :—

"3. The said notice and forms purported to be issued by the said F. Atterbury by the directions of the Commissioners of Inland Revenue under the provisions of the Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8).

"4. The said Hugh Bateson carries on the trade of a village blacksmith at Kirby Overblow aforesaid, a village adjacent to the said parish of Weeton, and is not in the employment of the said Commissioners.

"5. The forms accompanying the said notice required the recipient to comply with the following requisition, viz. :—

Annual value.
£

"'(i.) If the person making the return is also the occupier, state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair'

"6. The said notice and forms aforesaid are illegal, unauthorized, and ultra vires the said Act, as appears from the contents thereof.

"7. Amongst other matters so illegal, unauthorized, and ultra vires are the following :—

"(*a*) By the terms of the said Act the said Commissioners have no power to require the plaintiff to deliver the said forms to the said Hugh Bateson. The said Act requires the return to be furnished to the said Commissioners.

"(*b*) The plaintiff is required under requisition (i.) of the said forms aforesaid set out to supply matters which are not such matters as are set forth in section 26 (2.) of the said Act, and which, moreover, cannot properly be required under the said Act, and, further, the said matter is not such as it is in the plaintiff's power to give within the meaning of the said Act.

"(*c*) The plaintiff was not given the lawful time for making the said returns provided in section 26 (2.) of the said Act.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

"8. The said Commissioners have threatened to enforce the said penalty for failure to make the said returns."

The plaintiff accordingly claimed a declaration:—

"(1.) That he is under no obligation to comply with the said notice dated the 4th August, 1910, or to furnish any of the said particulars to the said Hugh Bateson or at all.

"(2.) The plaintiff is entitled to furnish any returns which he may be lawfully required to make under the said Act to the Commissioners of Inland Revenue and not to make it to the said Hugh Bateson, if the plaintiff so desires.

"(3.) The plaintiff is not under any obligation to comply with the said requisition (i.) aforesaid."

The Attorney-General thereupon took out a summons under Rules of Supreme Court, Order xxv., r. 4, to strike out the statement of claim as disclosing no reasonable cause of action, and Lush J., affirming a previous decision of the Master, made an order in the terms of the summons.

The plaintiff appealed. The appeal was heard on November 28.

Danckwerts, K.C., *Felix Cassel, K.C.*, and *Neilson*, for the appellant. This statement of claim raises an important question of law, and is not the kind of pleading which was intended to be dealt with under Order xxv., r. 4, which was to stop cases obviously frivolous or vexatious: *Attorney-General of the Duchy of Lancaster* v. *London and North Western Ry. Co.* (1), where the rule is clearly stated and explained.

[FLETCHER MOULTON L.J. The only question would seem to be whether an action of this kind can be brought against the Attorney-General. Order xxv., r. 4, cannot apply to this action.]

The Attorney-General can be sued as a defendant as representing the Crown, and in such a suit relief can be given against the Crown: *Hodge* v. *Attorney-General.* (2) That the Attorney-General can be sued as a defendant is clear from the following cases:—*Pawlett* v. *Attorney-General* (3); *Laragoity* v.

(1) [1892] 3 Ch. 274. (2) 3 Y. & C. Ex. 342.
(3) (1667) Hardres' Rep. 465.

Attorney-General (1); *Reeve* v. *Attorney-General* (2); *Casberd* v. *Attorney-General* (3); *Peto* v. *Attorney-General* (4); *Deare* v. *Attorney-General* (5); *Crauford* v. *Attorney-General* (6); *Ex parte Colebrooke, Bart.* (7); *Colebrooke* v. *Attorney-General.* (8)

It would seem from *Reg.* v. *Prosser* (9) that the Court has the same control over the Attorney-General as over any other suitor. Lush J. seems to have been misled by *Barraclough* v. *Brown* (10), but that case is not applicable.

There is now jurisdiction under Order xxv., r. 5, to make a declaratory order whether any consequential relief is or could be claimed or not. It is not necessary to proceed by petition of right. The Attorney-General is according to the above authorities a proper party to this action, and the pleading should be allowed to stand, leaving it to the Attorney-General to raise such defence as he may be advised by his statement of defence in the usual way.

Sir J. Simon, K.C., S.-G., and *Rowlatt*, for the respondent. The authorities relied on by the appellant have no application except in cases in which the rights of the Crown are only incidentally concerned; in all cases where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: Mitford on Pleading, 5th ed. [30].

[FARWELL L.J. referred to *Kirk* v. *Reg.* (11)]

There is no justification or precedent for this form of action, and it is a very inconvenient way of obtaining a decision as to the plaintiff's liability to the penalty in default of compliance with the notice. If an action of this kind will lie against the Crown there will be innumerable other actions for declarations as to the meaning of numerous other Acts of Parliament which impose a penalty, thus adding greatly to the labours of the law officers.

The plaintiff has no right to ask for a declaration that he is not under any obligation to comply with this notice. The

(1) (1816), 2 Price, 172.
(2) (1741) 2 Atk. 223.
(3) (1819) 6 Price, 411, 477.
(4) (1827) 1 Y. & J. 509.
(5) (1835) 1 Y. & C. Ex. 197.
(6) (1819) 7 Price, 1.
(7) (1803) 7 Price, 87.
(8) (1807) 7 Price, 146.
(9) (1848) 11 Beav. 306, 314.
(10) [1897] A. C. 615.
(11) (1872) L. R. 14 Eq. 558, at p. 563.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

plaintiff may have a good defence if the Attorney-General proceeds by information to recover the penalty, but he has no right to bring an action of this kind; it is turning the procedure upside down.

The equity jurisdiction of the Court of Exchequer as a Court of Revenue was not taken away by 5 Vict. c. 5: *Attorney-General* v. *Halling* (1); and in that Court a declaratory judgment could not have been obtained. [*Sir Thomas Cecil's Case* (2) was also referred to.]

Order xxv., r. 5, does not apply to proceedings on the Revenue side, and Order lxviii., r. 1 (*c*), excludes declaratory judgments under the rules on the Revenue side of the King's Bench Division.

Danckwerts, *K.C.*, in reply.

Cur. adv. vult.

Dec. 10. COZENS-HARDY M.R. This is an appeal from an order of Lush J. in chambers confirming an order of the Master dismissing the action with costs. The application in chambers was made under Order xxv., r. 4, and the action relates to what is known as "Form IV." under the Finance Act. The statement of claim alleges that a notice was served upon the plaintiff, signed by the secretary to the Commissioners of Inland Revenue, requiring him to deliver certain returns within thirty days under a penalty not exceeding 50*l*. It alleges that certain requisitions in the said form are illegal and unauthorized, and that the Commissioners have threatened to enforce the penalty for failure to make the return, and the plaintiff claims a declaration that he is not under any obligation to comply with the notice. It will be observed that the plaintiff does not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown.

It might be sufficient to say that Order xxv., r. 4, was not intended to take the place of a demurrer, and that it ought not to be applied to an action involving serious investigation of ancient law and questions of general importance, and on this ground alone I think the plaintiff is entitled to have the action proceed to trial in the usual way, leaving the Attorney-General

(1) (1846) 15 M. & W. 687. (2) (1598) 7 Rep. 39.

to make any objection he may be advised to raise by his statement of defence. As, however, the case has been elaborately argued before us, I think it better that we should state our views upon the interesting question whether the Attorney-General can be sued in a case like this.

I start with this proposition, that the penalty which is threatened to be enforced against the plaintiff is one which the Attorney-General must sue for in this Court: Inland Revenue Regulations Act, 1890, ss. 21 and 22. This suggests that the Attorney-General ought to be liable to an action in so far as he threatens to enforce a penalty based upon non-compliance with an unauthorized notice.

It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown. *Pawlett* v. *Attorney-General* (1) is a very early authority on this point. *Laragoity* v. *Attorney-General* (2) is a case where this matter was a good deal discussed. In *Deare* v. *Attorney-General* (3) the Attorney-General demurred to such a bill. Lord Abinger (4) said: "I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned," and the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, and that where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: see Mitford on Pleading, p. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case. The case of *Hodge* v. *Attorney-General* (5) is an important decision. I have examined the record, which fully bears out

(1) Hardres' Rep. 465.
(2) 2 Price, 172.
(3) 1 Y. & C. Ex. 197.
(4) Ibid. at p. 208.
(5) 3 Y. & C. Ex. 342.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

Cozens-Hardy M.R.

the report, with one exception. The plaintiffs were equitable mortgagees by deposit of the title deeds of certain leasehold premises. George Bailey, who had deposited the deeds, was convicted of felony, the result of which was that the legal title was vested in the Crown. The plaintiffs filed their bill in the Exchequer, making the Attorney-General sole defendant. It came on before Alderson B., "sitting in equity," as he himself stated. The Court declared the plaintiffs entitled to an equitable mortgage or lien, and referred it to the Master to take an account of what was due to the plaintiffs for principal, interest, and costs; and the decree proceeded to order, "By consent of Her Majesty's Attorney-General," that the plaintiffs should hold certain premises until they should be fully satisfied what the Master should find to be due to them, and the tenants were directed to attorn. This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. The only doubt raised in argument was due to the circumstance that the Crown had the legal estate, and that the Crown could not be compelled to convey that legal estate. But Alderson B. in a considered judgment expressly held that he had jurisdiction to make a declaration and to direct an account, and also to decree that the plaintiffs should hold possession until they were repaid, although it is true that in the decree itself the last part of the relief, but not the earlier parts, was by the consent of the Attorney-General. So far as I can discover, the authority of *Hodge* v. *Attorney-General* (1) has never been challenged, and I think it ought to be followed. It was suggested that there was something peculiar in the jurisdiction of the old Court of Exchequer which might account for such a decision. I cannot adopt this view. No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the

(1) 3 Y. & C. Ex. 342.

old Court of Chancery could do can now be done by both Divisions of the High Court.

But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action. The absence of any precedent does not trouble me. The power to make declaratory decrees was first granted to the Court of Chancery in 1852 by s. 50 of 15 & 16 Vict. c. 86, under which it was held that a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it: see *Rooke* v. *Lord Kensington*. (1) The jurisdiction is, however, now enlarged, for by Order xxv., r. 5, "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment, or order, is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party. The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which r. 5 might with advantage be applied. But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say "Wait until you are attacked and then raise your defence," and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial. In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right.

(1) (1856) 2 K. & J. 753.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

Cozens-Hardy M R

It is needless to say that I have not expressed, nor have I formed, any opinion as to the substance of the case alleged by the plaintiff. I have dealt only with the question of form. In my opinion the appeal must be allowed and the order discharged. In fairness to the learned judge from whose order the appeal is brought, I would add that the authorities bearing on the case were not, and could not be, called to his attention in chambers.

FLETCHER MOULTON L.J. In this case the plaintiff has received a paper from the Commissioners of Inland Revenue (known ordinarily as Form No. IV.) making certain inquiries and threatening him with a penalty unless the inquiries are answered by a certain date, and he is desirous of testing the legality of the procedure, and for that purpose has brought an action against the Attorney-General for a declaration that he is under no obligation to comply.

The law advisers to the Crown, being of opinion that this course was not open to the plaintiff, took out a summons to dismiss the action on the ground that it was frivolous and vexatious and disclosed no reasonable cause of action. The Master and the judge approved of their contention, and it is from this decision of the judge in chambers that the present appeal is brought.

Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant

challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

The objection taken by the Crown in the present case was solely that there was no justification or precedent for the form of the action. Neither side has discussed the merits either here or at chambers. Mr. Rowlatt on behalf of the Crown frankly stated that in chambers he relied solely on a paragraph in Mitford on Pleading, which he considered to support his contention, and the Master and the judge took his view. In my opinion the passage does not bear the interpretation which he puts upon it. If it does bear that meaning it does not accurately state the law at the time, for it would be inconsistent with the case of *Hodge* v. *Attorney-General* (1), where an action was brought against the Attorney-General as sole defendant as representing the Crown in order to obtain a declaration affecting the rights of the Crown and consequent relief. Moreover, even if the statement of Mitford could have been supported in the then state of the law (which did not permit of actions for declarations unless the Court could also grant specific relief), I should not be prepared to hold that it is correct in the present state of the law which permits of an action whose sole object is a declaratory judgment.

The question in what branch of the jurisdiction of the old Court of Exchequer the case of *Hodge* v. *Attorney-General* (1)

(1) 3 Y. & C. Ex. 342.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

Fletcher Moulton L.J.

was decided has been hotly contested before us in the argument in this case. I do not propose to enter into this question. The very fact that the parties agree that the answer we give in so recondite a matter may have an important, and in one alternative decisive, effect on the right to bring the present action, shews conclusively to my mind that it is not a case for the exercise of these exceptional powers. For, as I have said, an order of this kind ought not to be made where there is any reasonable ground for argument as to the maintainability of the action. Moreover it is unfair on the judge at chambers himself to require him to decide a question involving such an investigation of old authorities none of which are or can be properly called to his notice.

The sole question for our decision on the present occasion is whether or not this order should have been made in this case, and therefore I have no hesitation in coming to the conclusion that this appeal ought to be allowed.

FARWELL L.J. Order XXV., r. 4, was never intended to apply to a case of this kind, and we might well have allowed the appeal on this ground alone, but the case raises a question of public importance, and as we have had it fully argued I think that we ought now to decide it.

The Attorney-General contends that he is not the proper defendant, that no such declaration as is asked could ever have been obtained in any Court against any defendant, and that, therefore, none such can now be obtained in the High Court, and that the subject has no remedy, but can only defend actions for penalties when he is sued.

Now the action asks for no declaration in respect of any penalty; the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50*l.* penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them

and to whom it is injurious to the plaintiff's interest to send them. This appeal has been heard as if it were on demurrer under the old practice, and the allegations must therefore be taken as true for the present purpose. It is obviously a question of the greatest importance; more than eight millions of Form IV. have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

1. In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side (see *Deare* v. *Attorney-General* (1)), could and did make declarations and orders which did affect the rights of the Crown. The two cases of *Pawlett* v. *Attorney-General* (2) and *Hodge* v. *Attorney-General* (3) on the one hand and *Reeve* v. *Attorney-General* (4) on the other are good illustrations of the distinction. It has not, since the Commonwealth at any rate, been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the prerogative; in 1667 Baron Atkyns in *Pawlett* v. *Attorney-General* (5) says: "The party ought in this case to be relieved against the King; because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common

(1) 1 Y. & C. Ex. 197, at p. 208.
(2) Hardres' Rep. 465.
(3) 3 Y. & C. Ex. 342.
(4) 2 Atk. 223.
(5) Hardres' Rep. at p. 469.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

Farwell L.J.

person should not be equity against him." So too, in the case where a petition of right is required, that proceeding "exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights": per Lord Cottenham in *Monckton* v. *Attorney-General.* (1) It is very unusual for the responsible minister to refuse to authorize the indorsement "let right be done," and it would be unjustifiable to refuse in any case where a plausible claim is made out. As Lord Langdale says in *Ryves* v. *Duke of Wellington* (2), "I am far from thinking that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right." The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines. The argument on behalf of the Attorney-General admits for this purpose the illegality of the inquiries, but claims for a Government department a superiority to the law which was denied by the Court to the King himself in Stuart times.

2. Then it was argued that there is no precedent for such an order as is asked in this action. That may very well be, because before the Judicature Act the Court of Chancery would not make declarations of right where the plaintiff did not, or at any rate could not, ask for consequential relief. Order xxv., r. 5, has altered this, and declarations of right can now be obtained in cases where the Court of Chancery would have refused to make them. Then it was objected that the penalty made the neglect to answer the questions a criminal or quasi-criminal offence and that the Court of Chancery would not interfere in such a case, and this may very well have been true before the Judicature Acts: *Prudential Assurance Co.* v. *Knott* (3); but it is otherwise since those Acts: *Bonnard* v. *Perryman.* (4)

(1) (1850) 2 Mac. & G. 402, at p. 412.
(2) (1846) 9 Beav. 579, at p. 600.
(3) (1875) L. R. 10 Ch. 142.
(4) [1891] 2 Ch. 269.

3. The next argument on the Attorney-General's behalf was "ab inconvenienti"; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. Within the present year in this Court alone there have been no less than three such cases. In *Rex* v. *Board of Education* (1) the Board, while abandoning by their counsel all argument that the Education Act, 1902, gave them power to pursue the course adopted by them, insisted that this Court could not interfere with them, but that they could act as they pleased. In *In re Weir Hospital* (2) the Charity Commissioners were unable to find any excuse or justification for the misapplication of 5000*l.* of the trust funds committed to their care. In *In re Hardy's Crown Brewery* (3) the Commissioners of Inland Revenue, who are entrusted by s. 2, sub-s. 1, of the Licensing Act, 1904, with the judicial duty of fixing the amount of compensation under the Act, fixed the sum mero motu without any inquiry or evidence and without giving the parties any opportunity of meeting objections, and claimed the right so to act without interference by any Court. Bray J. and the Court of Appeal held that they had acted unreasonably and ordered them to pay costs. In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case

(1) [1910] 2 K. B. 165. (2) [1910] 2 Ch. 124.
(3) [1910] 2 K. B. 257.

C. A. 1910

DYSON v. ATTORNEY-GENERAL.

Farwell L.J.

which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare* v. *Attorney-General* (1): "It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred." I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

I agree that this appeal should be allowed, but it is only fair to the learned judge to add that this is not a case which could be properly argued in chambers, and that his attention was not called to all the cases cited to us, but reliance was really placed on the passage in Mitford on Pleading, which is not quite accurate.

Appeal allowed.

Solicitors: *Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds*; *Solicitor for Inland Revenue.*

(1) 1 Y. & C. Ex. at p. 208.

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.
1910
Dec. 8.

PRESTED MINERS COMPANY, LIMITED *v.* GARDNER, LIMITED.

Sale of Goods—Contract not to be performed within a Year—Writing signed by Party to be charged—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 *& 57 Vict. c.* 71), *s.* 4.

Sect. 4 of the Statute of Frauds (so far as relates to agreements not to be performed within a year) applies to agreements for the sale of goods and is not repealed by the Sale of Goods Act, 1893. Therefore an agreement for the sale of goods is not taken out of the operation of the above provision of the Statute of Frauds by reason of there having been an acceptance and actual receipt by the buyer of part of the goods so sold.

Decision of Walton J., [1910] 2 K. B. 776, affirmed.

Appeal by the plaintiffs from a decision of Walton J. (1)

Holman Gregory, K.C. (*Valetta* with him), for the appellants, gave up the point of law which was decided in the Court below, namely, that s. 4 of the Statute of Frauds did not apply to an agreement for the sale of goods which complies with the requirements of s. 4 of the Sale of Goods Act, 1893, but contended upon the construction of the agreement that it was not an agreement which was not to be performed within a year within the meaning of s. 4 of the Statute of Frauds.

Bailhache, K.C., and *J. B. Matthews*, for the respondents, were not called upon.

Cozens-Hardy M.R. I think there is nothing in this appeal. The decision of Walton J. upon the only point raised before him was clearly right even by the admission of the appellants' counsel, and it is quite plain that this was a contract which was not to be performed within a year within the meaning of s. 4 of the Statute of Frauds. The appeal must be dismissed with costs.

Fletcher Moulton and Farwell L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants: *Coleman & Coleman.*

Solicitors for respondents: *Dennison, Horne & Co., for E. S. Taylor, Birmingham.*

(1) [1910] 2 K. B. 776.

H. B. H.

K. B. D. 1910 *May* 26, 27. C. A. *Nov.* 23, 24.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

SAQUI & LAWRENCE *v.* STEARNS.

Insurance—Burglary Policy—Theft—Exception of Theft by Member of Business Staff—Accessory before the Fact—Principal in the Second Degree.

A policy of insurance upon goods in business premises against loss by theft or burglary contained a proviso excepting loss by theft by members of the assured's business staff.

A porter on the business staff of the assured, in pursuance of a preconceived scheme, admitted a member of a gang of thieves into the premises to enable him to commit a theft therein. The theft was committed in the porter's absence:—

Held, that the case fell within the proviso and that the underwriters were not liable; by Walton J., because the porter, being an accessory before the fact, was by virtue of the Accessories and Abettors Act, 1861, guilty of theft; by the Court of Appeal, because he was a principal.

Action on a policy of insurance.

The plaintiffs, the assured, were jewellers having a place of business in the Strand. They effected an insurance on the stock of jewellery in their premises by means of a Lloyd's policy of insurance against burglary and theft.

The defendants were the underwriters of the policy, which with immaterial omissions was in the following form:—"Messrs. Saqui and Lawrence have paid 203*l*. 12*s*. 6*d*. premium or consideration to us who have hereunto subscribed our names to insure them from loss $\frac{\text{and}}{\text{or}}$ damage by theft or robbery, with or without violence, or burglary of the property herein specified or any part thereof from the premises herein mentioned during the period from October 10, 1909, to October 9, 1910, both inclusive, and fifteen days of grace allowed for renewal . . . . Provided always that there shall be no claim on this policy . . . . for loss by theft, robbery, or misappropriation by members of the assured's household, business staff, or other inmates of the insured premises."

One Hasel was employed by the plaintiffs as a porter on the plaintiffs' business premises, and it was his duty to lock up the premises every night. In December, 1909, Hasel was introduced by one Wiltshire to two members of a gang of thieves

named Michael and Lucy, and Hasel and these two men concocted a scheme for breaking into the plaintiffs' premises and stealing jewellery from the safe. Hasel furnished them with full particulars of the premises, shewing them where the alarms were situated and how to switch them off, and he also drew out a plan of the shop and basement. He suggested that one of the two should be admitted to the basement by a side door on a Saturday night shortly before the shop was closed; that whoever was admitted should conceal himself in the coal cellar and after the shop was closed should admit his confederate to the premises by the back door; they were then to cut a hole through the ceiling of the basement, which would give them access to the back office and so enable them to work on the back of the safe on the ground floor without being seen from the front. On the evening of Saturday, January 8, 1910, Hasel admitted Michael to the basement as arranged. Then, after locking up and leaving the premises, he met Lucy, who fetched his tools and was let in to the premises by Michael, and jewellery to the value of about 1200*l.* was stolen. Hasel was not present when the theft was committed. He subsequently received a share of the proceeds of the plunder. Lucy, Hasel, and Wiltshire were arrested and, Hasel having turned King's evidence, were convicted of breaking and entering the plaintiffs' shop and stealing therein the jewellery in question.

These facts are taken from the shorthand notes of the proceedings in the criminal trial which were by agreement admitted as evidence.

An order having been made in chambers for the trial of the question whether as a matter of law the defendants were liable in these circumstances,

J. R. Atkin, K.C., and *Evans Austin*, for the plaintiffs. The defendants are liable unless there was a loss by theft by Hasel. There was no theft by Hasel. He was an accessory before the fact to the theft by others, but was not himself one of the thieves. The distinction between a principal felon and an accessory still exists, having been expressly preserved by the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), for although by s. 1 of

1910

SAQUI & LAWRENCE v. STEARNS.

that Act an accessory before the fact may be indicted, tried, convicted, and punished in all respects as if he were a principal felon, yet by s. 2 whoever shall counsel, procure, or command any other person to commit any felony may be indicted and convicted as an accessory before the fact to the principal felony and punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished. (1) The distinction between principal felons and accessories will be found stated in Archbold, Criminal Practice, 23rd ed., p. 16; Stephen, History of the Criminal Law, vol. 2, p. 229. "Theft is the act of dealing, from any motive whatever, unlawfully and without claim of right with anything capable of being stolen in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof": Stephen, Digest of the Criminal Law, 1st ed. (1877), art. 295, p. 206; 5th ed. (1894), art. 321, p. 254. No act of dealing with the jewellery in this case was done by Hasel, and consequently there was no theft by him. On the other hand there was a loss by theft by the accomplices, and the defendants are liable on that account within the words of the policy and none the less because Hasel aided and abetted them.

Arthur Cohen, K.C., and *Sims Williams*, for the defendants. There can be no doubt that in a popular sense Hasel robbed his masters; and so did he in the legal sense: *Joshua Cornwall's*

(1) Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94):—

Sect. 1: "Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

Sect. 2: "Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principa felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

Case (1); Hawkins, Pleas of the Crown (Curwood), bk. 1, c. 17, s. 14, p. 132; (Leach) bk. 1, c. 38, s. 14, p. 228; Hale, Pleas of the Crown, vol. 1, p. 553; Bl. Com., vol. 4, p. 227; *Rex* v. *Jordan*. (2) He was an accessory before the fact if not a principal: Stephen, Digest of the Criminal Law, 1st ed., arts. 35—39; 5th ed., arts. 36—40; Russell on Crimes, 7th ed., vol. 1, p. 106. "Accessories before the fact, principals in the second degree, and principals in the first degree in any felony are each considered as having committed that felony, and each may be indicted, tried, convicted and punished as if he alone and independently had committed the felony . . . .": Stephen, Digest of the Criminal Law, 1st ed., art. 44, p. 27; 5th ed., art. 45, p. 36. A policy of insurance is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense: *Robertson* v. *French* (3); *Carr* v. *Montefiore*. (4)

The scope and intention of this policy is to protect the assured from loss through burglary or theft committed by strangers and not by the assured's own servants. As servants have greater facilities for committing thefts than strangers have, loss by theft committed by servants is excepted from this policy. Probably a higher premium would be payable for insurance against loss through the theft of servants. This was a theft by a member of the plaintiffs' business staff within the meaning of the exception, and the defendants are not liable. [*In re George and Goldsmiths and General Burglary Insurance Association* (5) was also cited.]

Atkin, K.C., in reply.

(1) (1730) 2 Str. 881.
(2) (1836) 7 C. & P. 432.
(3) (1803) 4 East, 130, at pp. 135, 136
(4) (1864) 33 L. J. (Q.B.) 256.
(5) [1899] 1 Q. B. 595.

1910

SAQUI & LAWRENCE v. STEARNS.

WALTON J. In this case the plaintiffs sue the defendants to recover a sum of money to which they claim to be entitled under a Lloyd's burglary policy. The amount is not in dispute, and the only question I have to decide is whether the underwriters are liable.

It is said that the loss in this case was by theft by a member of the assured's business staff, that the case therefore comes within the proviso, and that consequently the defendants are not liable. It is admitted that Hasel was a member of the plaintiffs' business staff. A theft was committed, and I am quite satisfied that Hasel was an accessory before the fact to that theft.

Now an accessory before the fact is defined in Stephen's Digest of the Criminal Law, art. 40, 5th ed., p. 33, to be one who directly or indirectly counsels, procures, or commands any person to commit any felony or piracy which is committed in consequence of such counselling, procuring, or commandment. "Every one who would have been an accessory before the fact if the crime committed, procured, or commanded had been a felony, is a principal if that crime is misdemeanor . . . ." In the present case the crime was a felony. It follows from the above definition that if Hasel had merely counselled the commission of this crime he would have been an accessory before the fact. It was argued by the defendants that he was a principal in the second degree. Now "whoever aids or abets the actual commission of a crime, either at the place where it is committed, or elsewhere, is a principal in the second degree in that crime . . . .": see Stephen's Digest of the Criminal Law, art. 38, 5th ed., p. 31. The following illustration is then given: "A., B., and C. go out with a common design to rob. A. commits the robbery; B. stands by ready to help; C. is stationed some way off to give the alarm if any one comes. A. is a principal in the first degree, B. and C. are principals in the second degree." A man may therefore be aiding and abetting the commission of a crime notwithstanding that he may himself be at some distance off; but there in the case supposed he is aiding and abetting the actual commission of the crime. In Archbold's Criminal Practice, 23rd ed., p. 16, an accessory before the fact is defined to be "one who, though absent at the time of the felony committed, doth yet procure,

counsel, command or abet another to commit a felony . . . . If the party be actually or constructively present when the felony is committed, he is, as we have seen, an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed." It follows, however, from that and from the passage last cited from Stephen's Digest of the Criminal Law that a man though absent in fact may be constructively present so as to make him a principal in the second degree.

Now, that being the law, I have come to the conclusion that Hasel was not a principal in the second degree. He allowed Michael to come into the shop and gave him the opportunity of entering it. In that sense he procured the commission of the theft and was an accessory before the fact to its commission. But he went away before any crime was committed, and although he did, it is true, give information as to the plan of the plaintiffs' premises and admit Michael into them, he did not take any part in the actual commission of the crime, whether by being actually or constructively present when it was committed; and therefore he was not in my opinion a principal in the second degree. Then what is the position of an accessory before the fact to a theft? Is he a thief himself? The distinction between principals and accessories is rather artificial; it does not exist in the case of misdemeanours and was created by the judges at common law in favour of life in cases where the only sentence for a principal offender was a sentence of death. It seems to me that since the passing of the Accessories and Abettors Act, 1861, the distinction is now abolished. An accessory before the fact in the case of theft can now be convicted as a thief. As against this view it is urged that this is a mere matter of procedure; that a man may be punishable as a thief without being thereby made a thief; and that a man may still be indicted as an accessory before the fact. In answer to that I again cite Stephen's Digest of the Criminal Law, art. 45, 5th ed., p. 36: "Accessories before the fact, principals in the second degree, and principals in the first degree in any felony, are each considered as having committed that felony, and each may be

1910

SAQUI & LAWRENCE v. STEARNS.

Walton J.

indicted, tried, convicted and punished as if he alone and independently had committed the felony . . . ." Therefore in the case of a theft an accessory before the fact has committed the theft just as much as a principal in the second degree; there is no difference for this purpose whether a man is an accessory before the fact or a principal in the second degree; in either case the theft is by him.

Then the plaintiffs say, even if this was a theft by Hasel, it was not solely by him; it was a theft by him in conjunction with others; and therefore not within the proviso, which excepts claims for loss by theft by the members of the assured's business staff. I have not the least intention of reading the proviso laxly for the benefit of the underwriters or of giving the words any other than their reasonable sense. Was there here a loss by theft by a member of the assured's business staff? In my view there was a loss through theft by Hasel just as if he had stolen all that was stolen. No doubt others were associated with him, but that does not preclude there having been a loss by his theft. If he had made up his mind to steal these goods and had engaged the assistance of Michael as being an experienced burglar, it could not have been said that a theft successfully carried out as the result of their combined efforts was not a theft by Hasel, a member of the assured's business staff. To say it was not such a theft would deprive the underwriters of the very protection which this proviso was designed to afford them. A theft may be by a member of the assured's business staff within the meaning of this proviso even though it is committed by him in company with others. There must therefore be judgment for the defendants.

Judgment for defendants.

W. H. G.

The plaintiffs appealed. The appeal was heard on November 23 and 24, 1910.

J. R. Atkin, K.C., and *Evans Austin*, for the appellants. The proviso in the policy of assurance excepts "loss by the theft robbery or misappropriation by members of the assured's household, business staff or other inmates." The only word which

would apply to this case is "theft." But this could not be a theft by Hasel, for theft necessarily includes the carrying away of the thing stolen: Stephen's Digest of the Criminal Law, 6th ed., art. 322, p. 256. There is no doubt that the gang committed a theft, but Hasel did not. He was at most an accessory before the fact. There is an important difference between an accessory before the fact and a principal in the second degree: Stephen's Digest of the Criminal Law, 6th ed., arts. 39, 40; Stephen's History of the Criminal Law, vol. 2, pp. 229, 234. No one could be a principal in the second degree who was not present when the felony was committed. Apart from statute Hasel could not have been indicted for theft. It is true that by the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), an accessory may be indicted, tried, convicted, and punished as if he were a principal, but that does not make him a principal. Neither in strict law nor in common parlance was the loss of the chattels taken caused by a theft committed by Hasel, and the exception in the policy was not intended to apply to such a case. Assuming that Hasel was technically guilty of theft, it was primarily the theft of the others, and, that being so, the respondents are liable under the policy.

Arthur Cohen, K.C., and *Sims Williams*, for the respondents. Upon the evidence Hasel was a principal in the second degree. There was here a conspiracy for the purpose of stealing the goods, and all the acts of the conspirators are in law the acts of each one who took part in the scheme. The law is thus stated in Stephen's Digest of the Criminal Law, 1st ed., art. 38; 6th ed., art. 39: "When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose"; and the authorities shew conclusively that that proposition is correct: Hale, Pleas of the Crown, vol. 1, p. 533; *Joshua Cornwall's Case* (1); Dalton's Country Justice (1655 ed.), s. 99, p. 317. But suppose that Hasel was accessory before the fact he was still guilty of theft, for s. 2 of the Accessories and Abettors Act, 1861, provides that whosoever shall counsel or procure any other person to commit any felony shall be guilty of felony. Therefore under this Act Hasel was

(1) 2 Str. 881.

C. A. 1910

SAQUI & LAWRENCE v. STEARNS.

a felon. Further, it is sufficient that Hasel was guilty of theft in the popular sense of the word, for a business document of this kind is not to be construed according to any technical rules of construction, but regard is to be had to the subject-matter with which the parties are dealing, and then the words are to be taken in their natural and ordinary meaning: *Tatham, Bromage & Co.* v. *Burr.* (1) But whether the word "theft" is to be construed according to its technical meaning in the eye of the law or according to its popular meaning, Hasel was guilty of theft, and this was therefore a loss by theft by a member of the assured's business staff within the proviso.

Evans Austin in reply.

COZENS-HARDY M.R. This is an appeal from a decision of Walton J., whose death we all deeply regret, by which he held that underwriters under what is commonly known as a burglary policy were not liable because they were protected by a proviso exempting them from liability for loss by theft committed by members of the assured's business staff. [The Master of the Rolls read the policy and stated the facts substantially as above set out, and he continued:—] The learned judge in the Court below thought on the whole that Hasel was not a principal in the first or second degree, but rather an accessory before the fact, but that that was immaterial because under the Accessories and Abettors Act, 1861, he was made liable as a felon and found guilty as a felon of theft. The authorities to which Mr. Cohen in his able argument has called our attention satisfy me that the learned judge, though right in his conclusion, was not right in the view which he took that Hasel was purely an accessory. The authorities going back to Lord Hale and before that date seem conclusive. "The servant opens the window to let in a thief, who comes in and steals, burglary in the stranger, but robbery in the servant": Hale's Summary of the Pleas of the Crown, p. 81. *Cornwall's Case* (2), where all the judges gave similar opinions, points to the same conclusion. I think, therefore, that this is a case in which Hasel was actually guilty of theft, and that the loss has been occasioned by theft by Hasel, one of the

(1) [1898] A. C. 382, 386. (2) 2 Str. 881.

plaintiffs' staff. Then it was said that the loss ought to be apportioned; that it was not all due to Hasel; that it was in fact more due to the other men who came in with their tools and carried off the jewels in sacks or other receptacles. I decline to follow that. I do not think that the mysteries of asportavit ought to be introduced into a case of this kind. Hasel was a thief; the loss was owing to the theft; the loss falls within the proviso, and the underwriters are not liable. I am of opinion, therefore, that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. With all respect to the learned judge who gave the judgment in the Court below I think that his scruples about finding Hasel a principal were unfounded. He seems to me to have come clearly within the recognized definitions of a principal which have been acted upon for hundreds of years. The theft was by him and others, but in the eye of the law it was a theft by him.

The second point is really too clear for argument. It is contended on behalf of the plaintiffs that though it was a theft by Hasel it was a theft by somebody else, and that because it was a theft by somebody else the claim is within the terms of the policy. But that leaves out of consideration the language of the proviso, which says that no claim on this policy is to be made when the loss is by theft by a member of the assured's business staff. The fallacy of the argument is this: that because the loss can be described in a way which would not bring it within the proviso, therefore it is outside the proviso. It is quite sufficient to bring it within the words of the proviso that it can be accurately described in a way which brings it within those words. Whether it can or cannot be described in some other way is perfectly immaterial. If it is once within the proviso no claim with regard to it can be made on the policy. In my opinion the decision of the learned judge was correct and the appeal fails.

FARWELL L.J. I am of the same opinion. I take it to be plain from Mr. Cohen's authorities that Hasel was guilty as a principal in the second degree, and the words, therefore, of

C. A. 1910

SAQUI & LAWRENCE v. STEARNS.

Farwell L.J.

the proviso clearly apply. We are considering a mercantile document, but even if it were not so I should be of opinion that the parties used "theft" in the sense that the man can be indicted and punished for the crime of theft even though he were merely an accessory before the fact under s. 1 of the Act of 1861 instead of being guilty, as in my opinion this man is guilty, of the substantive crime of theft under s. 2.

As regards the other point the argument of the appellants would defeat the whole object of the proviso. The basis of the policy to my mind is this: Lloyd's say "We are willing to take all the ordinary risks of theft by outsiders, but you choose the members of your own household and your own business staff, and therefore we will not be responsible for any theft committed by them." Would this theft ever have taken place if it had not been for Hasel? It is plain it would not. Moreover, I fail to see how it is possible to apportion the loss and say what is the amount attributable to one thief and what to another. If they were sued in Court for wrongful conversion they would be all jointly liable, and, to my mind, it is impossible to say that the man who let in the others to the premises and stood by and assisted, but did not actually carry away anything, is not answerable for the theft.

For these reasons I think that the conclusion to which my late brother Walton J. came was correct and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Mellor & Co.*

Solicitors for defendants: *G. F. Hudson, Matthews & Co.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 29.

COMMITTEE OF VISITORS OF GLAMORGAN COUNTY ASYLUM *v.* CARDIFF GUARDIANS.

Lunatic — Pauper Lunatic — Expenses of Maintenance — Reasonable Charges —Order of Justices—Lunacy Act, 1890 (*53 & 54 Vict. c. 5*), *ss.* 283, 287.

On an application to justices for an order under s. 287 of the Lunacy Act, 1890, for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians; and in fixing that amount the justices are not restricted to the limit of 14*s.* a week imposed by s. 283.

Dictum of Wright J. in *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494, overruled.

Where, owing to special circumstances, the application to the justices is for a sum exceeding the weekly sum fixed by the visiting committee under s. 283, the order ought not to be made ex parte; and the order, whether made ex parte or on notice, ought to be not absolute in form, but until further order only.

Appeal from the decision of a Divisional Court (Bray and Lord Coleridge JJ.). (1)

The plaintiffs, the committee of the visitors of the Glamorgan County Asylum at Bridgend, sued the defendants, the guardians of the poor of the Cardiff Poor Law Union, in the county court at Cardiff, under s. 314 of the Lunacy Act, 1890, to recover the sum of 48*l.* 11*s.* 6*d.* balance of amount due for the lodging, maintenance, medicine, clothing, and care of Sarah Gould and Anne Jones, two pauper lunatics confined in the said asylum, being at the rate of 1*l.* 1*s.* per week in respect of Gould and 17*s.* 6*d.* per week in respect of Jones from April 13, 1909, to February 8, 1910, which sums were ordered to be paid by the defendants to the plaintiffs under two orders dated respectively December 13, 1909, and made by two justices of the peace for the county of Glamorgan under s. 287 of the Lunacy Act, 1890. (2)

(1) [1910] 2 K. B. 547.

(2) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283:

"(1.) Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum, and of such amount that the total of such weekly sums shall be sufficient

C. A. 1910

GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) v. CARDIFF GUARDIANS.

The order of the justices relating to Gould recited that a complaint had been made by the plaintiffs that, in pursuance of an order of a justice of the peace, Gould, a pauper lunatic, then residing in the parish of Cardiff within the defendants' union, was on December 26, 1885, duly conveyed to the asylum for the county of Glamorgan at Bridgend; that at the time of making the said order she had a legal settlement in the parish of Cardiff; that she had since been, and still was, confined in the asylum as a lunatic; that by reason of the special care and treatment required by her state of health and mental condition the sum of 14*s*., the weekly sum fixed by the plaintiffs for the lodgment, maintenance, medicine, clothing, and care of each pauper lunatic in the asylum, was not sufficient in the case of Gould; and that since April 13, 1909, the plaintiffs had paid 36*l*. 15*s*. for the maintenance expenses of Gould in the asylum, of which sum the defendants had repaid to the plaintiffs 17*l*. 2*s*.

And by the said order the Court, after hearing evidence, adjudged the complaint and the several recited allegations to be true and ordered the defendants to pay to the plaintiffs

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to defray such expenses and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered.

"(2.) If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs, may by order direct such addition to be made to the weekly sum as to the local authority seems necessary, and every such order shall be signed by the clerk of the local authority, and forthwith published in a local newspaper.

"(3.) A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

Sect. 287: "(1.) The justice by whom any pauper lunatic is sent to any institution for lunatics under this Act, or any two justices of the county or borough in which the institution for lunatics where any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or any two justices, being visitors of such institution, may make an order upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer, or manager of the institution, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of such lunatic.

"(2.) Any such order may be retrospective or prospective, or partly retrospective and partly prospective.

"(3.) An order under this section shall not be subject to appeal."

the sum of 19*l.* 13*s.*; and the Court further ordered the defendants to pay to the plaintiffs weekly from the date of the order the sum of 21*s.*, which sum appeared to the Court to be a reasonable charge for the future lodging, maintenance, medicine, clothing, and care of the said pauper lunatic for so long a time as she should remain and be confined under the first-mentioned order in the said asylum or such other asylum as she might thereafter be removed to.

The order for the payment of 17*s.* 6*d.* a week in respect of Jones, who had been taken to the asylum on May 3, 1887, from Cardiff, where she had a legal settlement, was in similar terms.

The defence to the action was that by reason of s. 283, sub-ss. 1 and 3, of the Lunacy Act, 1890, the defendants were not liable to pay more than 14*s.* a week in respect of each of the lunatics. They had paid at that rate during a part of the period in question, and as to the remaining part they were willing to pay at the same rate.

The county court judge was not satisfied that he had any right to consider whether the justices' orders were ultra vires or not, but, assuming that he had, he was of opinion that the powers of the justices under s. 287 were not restricted to making an order for payment of a sum not exceeding 14*s.* a week in respect of each lunatic; he therefore gave judgment for the plaintiffs for the amount claimed.

On appeal, the Divisional Court took the same view of the construction of s. 287 and affirmed the decision of the county court judge.

The defendants appealed.

Macmorran, K.C., and *S. Davey*, for the appellants. The expenses referred to under the term "reasonable charges" in s. 287 are nothing more nor less than the expenses of maintenance referred to in s. 283; and the true object of s. 287 was simply to enable the visiting committee to obtain an order for payment which could be enforced in the event of the non-payment of the sums fixed under s. 283. The functions of the justices under s. 287 are purely ministerial, and they have no jurisdiction to fix a sum differing from that fixed by the visiting committee under

C. A. 1910

GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) v. CARDIFF GUARDIANS.

s. 283: *Suffolk County Lunatic Asylum* v. *Stow Union* (1), per Wright J., followed by the Divisional Court in *Suffolk Asylum* v. *Nottingham Union*. (2) This view is borne out by the fact that orders under s. 287 are usually made ex parte—*Reg.* v. *Bruce* (3)—and are not subject to appeal. The construction placed upon the section by the Divisional Court takes no account of s. 283, and the effect of the decision will be that the contributories to the asylum will never know what they are liable to pay. Sect. 283 provides a perfect scheme for the fixing by the visiting committee of the expenses of maintenance in respect of each pauper lunatic in the asylum, and the object of the Legislature was that there should be one uniform sum payable in respect of all the lunatics so as to avoid the necessity of inquiry into the circumstances of each particular case. [Reference was also made to *Fitch* v. *Bermondsey Guardians*. (4)]

Danckwerts, K.C., and *R. L. Vaughan Williams*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of the Divisional Court, who have in effect held that an order made by justices under s. 287 of the Lunacy Act, 1890, for the reasonable charges for the maintenance of a pauper lunatic of a sum in excess of the weekly contribution contemplated by s. 283 is a good order. In my opinion the decision of the Divisional Court was right, and I so entirely agree with their reasoning that I almost hesitate to add any expression of my own opinion. The scheme of the Act seems to me to be fairly obvious. The visiting committee are not the people who levy the rates. The visiting committee are the people who, subject to the control of the local authority, have the control and direction of the lunatic asylum. [The Master of the Rolls read s. 283, sub-s. 1.] One's knowledge of county affairs is quite sufficient to bear out what Mr. Macmorran said in the course of the argument, that the reasonable and usual way is for the visiting committee to fix a sum not every year, but from time to time as occasion may require, and if that sum is accepted by the local

(1) 76 L. T. 494.
(2) (1905) 69 J. P. 120.
(3) [1892] 2 Q. B. 136, 140.
(4) [1904] 2 K. B. 709; [1905] 1 K. B. 524.

authority sending lunatics to the asylum there is an end of the matter. That is what happens in ninety-nine out of a hundred cases. But s. 283 does not in its terms enforce any obligation or enable any payment at all to be exacted. It is really intended primarily to enable the rating authority to ascertain how much money they ought to require from the parishes or unions who are liable to contribute to the maintenance of the asylum. Then when we come to s. 287 we find this: [The Master of the Rolls read s. 287, sub-s. 1.] I am entirely unable to appreciate the argument very carefully presented to us by Mr. Macmorran that the reasonable charges mentioned in s. 287 necessarily mean the estimate of the average weekly cost formed by the visiting committee as contemplated by s. 283. It seems to me that the section plainly does not mean that. It plainly means, as it seems to me, that the justices under this section have not a purely ministerial function; they have a judicial function—a function in the discharge of which they are entitled and indeed bound to hear evidence, and they are quite entitled to say, and if their attention is called to the matter it is their duty to say, "We have nothing to do with the average weekly cost; we have to deal with the cost of this particular individual lunatic who is brought before us"; and, if they are satisfied that that particular lunatic by reason of the state of his health or other special circumstances costs more than the average, I think it would be entirely wrong for them to decline to go into that question and simply to accept the figures approved by the visiting committee. But then it is said that there is a dictum of Wright J. (in *Suffolk County Lunatic Asylum* v. *Stow Union* (1)) that the functions of the justices under this section are purely ministerial and not judicial. I am aware that that is the dictum of a very learned judge. I do not forget that in *Suffolk Asylum* v. *Nottingham Union* (2) the Divisional Court (consisting of Lord Alverstone C.J., Kennedy and Ridley JJ.), following that dictum, again seem to have treated the functions of the justices as purely ministerial. Speaking for myself, I think that is a mistake. I think the functions of the justices are judicial and not merely ministerial. But then it is said that in

(1) 76 L. T. 494. (2) 69 J. P. 120.

C. A. 1910

GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) v. CARDIFF GUARDIANS.

Cozens-Hardy M.R.

practice these orders are made ex parte. In nine cases out of ten there is probably no objection to that course, because I imagine that in nine cases out of ten the parties ask for the amount fixed by the visiting committee as the average weekly payment and no question is raised. But whenever a larger sum is asked for—whenever it is suggested that there are any exceptional circumstances—in that case I think the justices will be exercising a wise discretion if they decline to make an order ex parte and insist that notice of the application shall be given to the party chargeable in order that he may be present when the order is made. I desire also to state emphatically that in my opinion when an order is made by the justices, whether ex parte or on notice, it ought not to be made in the form in which it is made here, an order once for all fixing the sum for the entire period during which the lunatic is maintained in the particular asylum, but ought always to be until further order; and that is all the more necessary because the order is not appealable. If it is made until further order, then it is open to either of the parties to say We are not appealing from this order; it is an order containing words which enable us to say the circumstances have changed; and the order is either for too much or too little, as the case may be, and the order ought to be varied. In the present case what the justices have done is to make an order for a sum in excess of what I may call the current average of the visiting committee.

It is not suggested that the order was wrong in itself, but it is said that it was not competent to the justices under s. 287 to make any departure from the scheme of s. 283. I think that the judgment of the Divisional Court affirming the decision of the county court judge was right and that this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and I will only add a few words about the construction and effect of the two sections. It seems to me that s. 283 relates to administrative action on the part of the visiting committee. They have under sub-s. 1 to form an estimate of the weekly sum necessary to defray all the expenses referred to in that sub-section. The limit assigned to that weekly sum is 14*s*. In sub-s. 3 they deal

with foreign unions, and although the maximum is still 14*s.*, yet the sub-section permits them to differentiate against the foreign unions so as to charge them a greater sum than the home union is charged. Then, by sub-s. 4, any excess created by the payments of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund. Sub-s. 2 overrides the whole of these three sub-sections. It gives no new powers to the visiting committee, but it gives power to the local authority to direct that a further charge shall be made where the sum of 14*s.* shall be found insufficient. All these provisions relate to the contributories to the asylum and they are informed in this way what is the sum per week which it costs to maintain a lunatic at the asylum, and in ninety-nine cases out of a hundred that is the amount which they will have to contribute. When we turn to s. 287 we find a total change of language, which, in my opinion, implies a total change in the intent and object of the section. We have here nothing about weekly sums, but we have here a power given to a judicial body to direct the payment of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the particular pauper lunatic. Having this power, I conceive it is the duty of the tribunal to judicially fix what that charge shall be. I quite agree with what the Master of the Rolls has said, that in most cases all that would be asked for would be the sum fixed under s. 283, and that would be a matter not worth contesting, but there may be exceptional instances of particular lunatics where an order for that amount would not adequately meet the justice of the case. In my opinion the function of the justices under s. 287 is judicial and not ministerial, and although in many cases the question may be decided almost as a matter of course, still the character of the jurisdiction is judicial and not ministerial, and the limit of 14*s.* a week does not and cannot bind the tribunal.

FARWELL L.J. I am of the same opinion. There seem to me to be insuperable difficulties in adopting the construction contended for by the appellants. In effect we are asked to read the expenses of maintenance in s. 287 as equivalent to the sum ascertained and fixed under s. 283. The answer to that is that

C. A. 1910

GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) v. CARDIFF GUARDIANS.

Farwell L.J.

there is no such sum fixed because the expenses of maintenance are only one of three or four items which comprise the expenses to be fixed by the visiting committee subject to the limit of 14*s.* a week; the two things are not identical. Secondly we are asked to read in s. 287 the words "not exceeding 14*s.* a week," and instead of construing the words "reasonable charges" in their ordinary sense to qualify those words by saying that the charges are not to exceed the amount fixed by s. 283. That assumes there is such an amount, which I have already said there is not. But, if there were, that is striking out from the section the word "reasonable" and inserting words which are not in the section. I can see no justification for importing into s. 287 the limit imposed by s. 283, seeing that the effect would be to render the word "reasonable" in s. 287 unnecessary and meaningless, and to leave no scope for the exercise by the justices of any judicial functions. I agree with the view of the Master of the Rolls that this section deals with the particular case of a particular lunatic in the circumstances in which it comes before the tribunal. The reasonable charges of the maintenance of such lunatic may be very considerable or very small at the time when his case comes before the Court for consideration; they may diminish very much or increase very much; and in my opinion it is impossible to do full justice to the words "reasonable charges" if the order is made for all time without giving the Court an opportunity of considering in the future whether the sum allowed by the order ought to be increased or diminished. The fact that there is no appeal from the order lends additional support to this view. Therefore I agree with the Master of the Rolls that the proper course in all these cases will be to make the order until further order only. Upon all the other points I entirely agree with the Master of the Rolls and I have nothing to add.

Appeal dismissed.

Solicitors for appellants: *W. H. Martin & Co., for David & Evans, Cardiff.*

Solicitors for respondents: *Smith, Rundell & Dods, for A. H. Bullock, Cardiff.*

H. B. H.

THE LONDON COUNTY COUNCIL, APPELLANTS *v.* THE BERMONDSEY BIOSCOPE COMPANY, LIMITED, RESPONDENTS. 1910 *Dec.* 8, 9.

Cinematograph—Licence—Condition as to closing on Sundays, Good Friday, and Christmas Day—Validity—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2.

A county council, in granting a licence under s. 2 of the Cinematograph Act, 1909, to use certain premises for a cinematograph exhibition, for the purposes of which inflammable films are used, have power to insert therein a condition that the premises shall not be opened under the licence on Sundays, Good Friday, or Christmas Day.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellants against the respondents for that they, being the occupiers of the London Bridge Picture Palace and Cinematograph Theatre, on Sunday, February 27, 1910, unlawfully allowed the premises to be used for an exhibition of pictures or other optical effects by means of a cinematograph, for the purposes of which inflammable films were used, in contravention of the conditions upon which the appellants granted a licence relating to the premises under the Cinematograph Act, 1909, whereby the respondents became liable to the penalty prescribed by s. 3 of the Act.

Upon the hearing of the information it was proved that the appellants on January 19, 1910, granted to one Stockton, for and on behalf of the respondents, a licence to use the above-named premises for an exhibition therein of pictures and other optical effects by means of a cinematograph or other similar apparatus, for the purposes of which inflammable films were used. The licence was granted on certain terms and conditions and under certain restrictions, one of which was "that the premises be not opened under the licence on Sundays, Good Friday, or Christmas Day." The exhibition was to be subject to the regulations made by the Secretary of State under the Cinematograph Act, 1909, dated December 20, 1909. (1)

(1) These regulations, which are set out in the Statutory Rules and Orders, 1909, p. 11, and also in the appendix to Chitty's Statutes for 1909, p. 785, have now been superseded by the regulations made by

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

On Sunday, February 27, 1910, during the currency of the licence the premises were visited by a police inspector, who found an exhibition of pictures and other optical effects by means of a cinematograph with music then going on before a number of the public who had paid for admission thereto. With the cinematograph inflammable films were being used.

It was contended on behalf of the respondents that the Cinematograph Act, 1909 (1), was passed for the purpose of securing the safety of the public at cinematograph and other exhibitions; that the title and the various provisions of the Act shewed that such was its object; that the effect of ss. 1 and 2 was to render unnecessary any licence for premises at which non-inflammable films were used with cinematograph or other similar apparatus; that the regulations of the Secretary of State hereinbefore referred to were all regulations made with a view to carry out the purposes of the Act, namely, to secure the safety of the public in such exhibitions of pictures, &c., produced by means of inflammable films; and that the appellants had no power in law to impose upon the holder of the licence the condition above set forth, as such condition was beyond the scope of the Act and was ultra vires of the appellants, having regard to

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the Secretary of State on February 18, 1910, and set out in the Statutory Rules and Orders, 1910.

(1) The Cinematograph Act, 1909 (9 Edw. 7, c. 30), is entitled "An Act to make better provision for securing safety at cinematograph and other exhibitions."

Sect. 1: "An exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2, sub-s. 1: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

Sect. 3 provides that if the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if the occupier of any premises allows the premises to be used, in contravention of (inter alia) the conditions or restrictions of the licence, he shall be liable, on summary conviction, to a penalty.

their duty of granting licences in pursuance of the Act. The following cases were referred to in support of the respondents' contention: *Fielding* v. *Morley Corporation* (1), *Reg.* v. *West Riding County Council* (2), and *Rossi* v. *Edinburgh Corporation*. (3)

It was contended on behalf of the appellants that they had the legal power to impose the condition on the holder of the licence; that the condition was not inconsistent with or repugnant to the regulations of the Secretary of State; that the language of s. 2 of the Cinematograph Act, 1909, gave to the appellants discretion to impose such conditions as they determined were fit and proper to apply to premises to be used for the purposes of public exhibition; and that the condition only prohibited, in the form of a condition attached to the licence, what was already prohibited by the Sunday Observance Act, 1780 (21 Geo. 3, c. 49).

The magistrate was of opinion that the respondents' contentions were correct, and that by reason of the scope and purposes of the Cinematograph Act, 1909, the condition was ultra vires, and he dismissed the information.

The question for the Court was whether, upon the above facts, he came to a correct determination in point of law.

Danckwerts, K.C. (*Bodkin* with him), for the appellants. The condition in the licence that the exhibition shall not be opened on Sundays, Good Friday, or Christmas Day is good in law. It is the duty of the appellants to consider not only the safety of the public, with regard to which regulations are made by the Secretary of State under s. 1 of the Cinematograph Act, 1909, but also the public order. Sect. 2, sub-s. 1, of the Act shews that power is given to the appellants to refuse a licence on the ground that an applicant is unfit to hold it. While the power of the Secretary of State is limited by s. 1 to making regulations for securing safety, s. 2 contains no such limitation on the power of the appellants. There is no reason for restricting the powers given to the appellants by s. 2, sub-s. 1, to the same powers as are given to the Secretary of State. The appellants

(1) [1899] 1 Ch. 1. (2) [1896] 2 Q. B. 386.
(3) [1905] A. C. 21.

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

may make such regulations as they think fit, provided that those regulations are not in conflict with the regulations made by the Secretary of State. This condition stands upon the same footing as a by-law made by a public representative body and ought to be supported: *Kruse* v. *Johnson.* (1) It does not, under the form of regulating the exhibition, prohibit it altogether, as was the case of the by-laws in *Municipal Corporation of Toronto* v. *Virgo* (2) and *Rossi* v. *Edinburgh Corporation.* (3) The policy of the Legislature is to prevent the opening of places of public entertainment on Sunday: Sunday Observance Act, 1780 (21 Geo. 3, c. 49). A licensee must conform to the general regulations of the Cinematograph Act, 1909; to the regulations made by the Secretary of State with regard to public safety; and to the regulations made by the county council. It is desirable that persons should not be overworked by Sunday labour, and it is the duty of the appellants to consider the question of public order. The respondents having taken the licence with this condition in it are bound by it and are liable for a breach of the condition. [*Ex parte Richards* (4), *Reg.* v. *West Riding County Council* (5), and *Reg.* v. *Sheerness Urban District Council* (6) were also referred to.]

C. A. Russell, K.C. (*Sir F. Low, K.C.*, and *Profumo* with him), for the respondents. The Cinematograph Act, 1909, as its title shews, is intended to provide against the danger which may arise from the use of inflammable films at cinematograph and other similar exhibitions. The title of the Act is part of the Act: *Fielding* v. *Morley Corporation.* (7) The orderly conduct of the exhibition is outside the scope of the Act. That is made clear by the fact that the Act does not apply to an exhibition where inflammable films are not used. The words "on such terms and conditions and under such restrictions" in s. 2, sub-s. 1, of the Act must have reference either to securing safety at the exhibition, or to the user of the premises while they are being kept open for

(1) [1898] 2 Q. B. 91.
(2) [1896] A. C. 88.
(3) [1905] A. C. 21.
(4) (1904) 68 J. P. 536.
(5) [1896] 2 Q. B. 386.
(6) (1898) 62 J. P. 563.
(7) [1899] 1 Ch. 1.

the purposes of the exhibition. The condition that the premises shall be closed on Sundays, Good Friday, and Christmas Day is not a condition for securing safety, nor is it a condition having reference to the user of the premises while they are being kept open for the exhibition. It prohibits the opening of the premises altogether on certain days. If the condition is valid, there is no reason why other days should not be included in it. Moreover, if the appellants' contention is right, the respondents will be liable, if they open the premises on Sunday, to a penalty under s. 3 of the Cinematograph Act, 1909, for breach of the condition in the licence, and also to a penalty for breach of the Sunday Observance Act, 1780. In an action to recover the penalty under the Act of 1780 it would be no answer to say that the respondents had already been convicted under the Act of 1909. The condition in the licence therefore imposes a cumulative penalty and comes within the strictures of Rolfe B. in *Calder and Hebble Navigation Co.* v. *Pilling* (1) and is invalid. This objection is not met by s. 33 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), because the offences are different. No such condition or restriction as the present is provided for in the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), which deals with music and dancing licences in the metropolis; and in s. 51 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), which deals with music and dancing licences outside the metropolis, sub-s. 2 contains similar words to those in s. 2, sub-s. 1, of the Cinematograph Act, 1909, authorizing the justices to grant licences "upon such terms and conditions and subject to such restrictions" as they think fit, and yet the Legislature thought it necessary to provide expressly, in sub-s. 7, that the premises shall not be opened except on the days and hours stated in the licence. Again, s. 9 of the Theatres Act, 1843 (6 & 7 Vict. c. 68), gives justices (now the county council), who license theatres outside a certain part of the metropolis, power to make rules for ensuring order and decency in theatres and for regulating the times during which they shall be opened. All those enactments shew that when the Legislature meant to give the licensing authority power to

(1) (1845) 14 M. & W. 76, at p. 90.

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

impose a condition as to the days when the licensed premises should be opened it gave that power in express terms. No such power is contained in the Cinematograph Act, 1909. The authorities referred to in the case are not of assistance in construing the Act.

Danckwerts, K.C., was not called upon to reply.

LORD ALVERSTONE C.J. In this case the London County Council have inserted in a licence granted by them under the Cinematograph Act, 1909, a condition that the premises shall not be opened under the licence on Sundays, Good Friday, or Christmas Day. It is said that the county council have no power to impose this condition and that the condition is therefore ultra vires. The Act was passed to deal specially with a certain class of cinematograph exhibitions, and the title of the Act, upon which so much reliance has been placed on behalf of the respondents, is "An Act to make better provision for securing safety at cinematograph and other exhibitions." Sect. 1 of the Act provides that "an exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act." That section indicates that the regulations for securing safety at these exhibitions are prima facie those to be made by the Secretary of State, and the licence granted by the county council must, as appears from s. 2, be in accordance with those regulations. Sect. 2 provides that "a county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine." It cannot be disputed that this section is intended to include something more than s. 1, because not only is the licence to be subject to the regulations of the Secretary of State for securing safety, but the licence may be

granted to such persons as the county council think fit and on such terms and conditions and under such restrictions as they may determine. The argument on behalf of the respondents, to which the magistrate has given effect, is that the conditions which the county council have power to impose are conditions for securing safety, and the title of the Act, which according to the judgment of the Court of Appeal, delivered by Lindley M.R., in *Fielding* v. *Morley Corporation* (1) is part of the Act, was referred to as indicating the scope of the conditions which the county council may impose. I quite recognize that the title of an Act is part of the Act, and that it is of importance as shewing the purview of the Act; and I may express in this connection my regret that the practice of inserting preambles in Acts of Parliament has been discontinued, as they were often of great assistance to the Courts in construing the Acts. It has never yet, however, been laid down that, if the language of an Act is clear, full effect is not to be given to it because it goes beyond the title. The language of s. 2, sub-s. 1, seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable. It is further said that this condition as to closing on Sundays, Good Friday, and Christmas Day is invalid because it only purports to enforce that which is already the law under the Sunday Observance Act, 1780, with the result that if the condition is infringed the person infringing will be liable to a penalty in respect of the same act both under the Act of 1780 and also under the Cinematograph Act, 1909. I doubt it, but I express no opinion upon it. It may well be that an objection could be taken to the recovery of a double penalty; but even if it were as suggested, it does not follow that the condition in the licence is itself ultra vires. Having regard to the policy of the Sunday Observance Act, 1780, to the law and practice as to licensing music-halls and other places of public entertainment, it does not seem to me to be unreasonable and ultra vires for the county council to prohibit this class of entertainment being held

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

Lord Alverstone C.J.

(1) [1899] 1 Ch. 1.

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

Lord Alverstone C.J.

on the days named. The authorities are not of any assistance in this matter. In *Reg.* v. *West Riding County Council* (1) it was held that a county council acting as the licensing authority for the performance of stage plays had power to attach to the grant of a licence for such performances a condition that the grantee would undertake not to apply to the excise authorities under 5 & 6 Will. 4, c. 39, s. 7, for an excise licence to sell intoxicating liquors in his theatre. That decision, which was cited in *Reg.* v. *Sheerness Urban District Council* (2), in the Court of Appeal, seems to me to be only an illustration of the recognized principle that when powers are entrusted to a public body the Court will be slow to interfere with the exercise by them of those powers. With regard to the case of *Kruse* v. *Johnson* (3), that decision again shews that the Court ought to be slow to hold that a by-law made by a public representative body is void for unreasonableness. The question which we have in this case to consider is simply whether the condition is beyond the powers of the county council. If it is within their powers, it is clearly a reasonable condition. With regard to *Rossi* v. *Edinburgh Corporation* (4), there were three conditions inserted in the licence for the sale of ice cream under a local Act relating to Edinburgh, and the House of Lords held that the restrictions imposed by the licence were ultra vires. I doubt very much whether, if the condition requiring the premises to be closed for the sale of ice cream on Sundays had stood alone, the House would have held it to be ultra vires. That case, however, is very far from the present and has no bearing upon it.

For these reasons I think that the appeal should be allowed, and the case remitted to the magistrate.

PICKFORD J. I am of the same opinion. It is said that the condition as to closing the premises on Sundays, Good Friday, and Christmas Day is ultra vires of the county council upon the ground, as I understand, that their powers under the Cinematograph Act, 1909, are confined to inserting such conditions as may be necessary or advisable for securing safety at the exhibition.

(1) [1896] 2 Q. B. 386.
(2) 62 J. P. 563.
(3) [1898] 2 Q. B. 91.
(4) [1905] A. C. 21.

Sect. 2 of the Act gives the county council power to insert in the licence granted by them such terms and conditions and such restrictions as, subject to regulations of the Secretary of State, they may determine. If that enactment stood alone, I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought right. The section, however, does not stand alone. The title of the Act is "An Act to make better provision for securing safety at cinematograph and other exhibitions"; and then comes s. 1, which I need not read again. It is argued that the title shews that everything which has to be done under the Act must be done for the purpose of securing safety, and that s. 1 strengthens that view because the regulations to be made by the Secretary of State are confined to regulations for securing safety. I do not think that that argument is sound. Sect. 1 expressly limits the power of the Secretary of State to make regulations "for securing safety," whereas there is no such limitation imposed upon the power of the county council under s. 2. It may well be that the Legislature thought that, in addition to regulations which are specially directed to securing safety, it would be a further means of securing safety to give to the county council a free power to impose such terms, conditions, and restrictions as they thought right. It seems to me that the Act does, for the purpose of securing safety, give to the county council this general power, though such terms, conditions, and regulations may not directly point to the question of safety. The appeal should be allowed.

AVORY J. I am of the same opinion. In recent years the question whether the London County Council have power to attach to a music and dancing licence the condition that the premises shall not be opened on Sundays has been the subject of frequent consideration, and notwithstanding the efforts which I know have been made to get that condition withdrawn, no one has been bold enough to come into Court and say that the London County Council have no power to impose that condition in a music-hall licence. I

1910

LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE COMPANY, LIMITED.

Avory J.

have been unable to discover any distinction for this purpose between the condition which is imposed in the ordinary case of a music-hall licence and the condition which is impugned in the present case. At first sight it sounds a little startling to say that a condition which requires an applicant for a licence to obey the law is ultra vires. That is all that this condition does. It requires him to obey the general law regulating places of entertainment. It is said that it is ultra vires because it goes beyond the title of the Act. The effect of that argument would be that the licence could only contain conditions which are a repetition of the regulations made by the Secretary of State, because those regulations completely cover the whole purpose of securing safety. In my opinion it was contemplated by s. 2 that the licence might contain other conditions besides those set forth in the regulations of the Secretary of State, and therefore that contention fails.

Appeal allowed.

Solicitor for appellants: *E. Tanner.*

Solicitors for respondents: *Hatchett-Jones, Bisgood & Marshall.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 26.

JONES *v.* PACAYA RUBBER AND PRODUCE COMPANY, LIMITED.

Company—Action to rescind Contract for Shares—Unpaid Calls—Notice to forfeit Shares—Interim Injunction restraining Forfeiture.

If, while an action is pending against a company for the rescission of a contract to take shares, the company give notice to the plaintiff to forfeit the shares in consequence of non-payment of calls, the Court will, on the plaintiff paying into Court the amount of the call with interest, restrain the company until the trial of the action from forfeiting the shares.

Ripley v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327, disapproved of.

APPEAL from Lush J. at chambers.

On March 31, 1910, the plaintiff applied for 100 shares in the defendant company upon the faith of the representations set out in a prospectus issued by the defendant company on March 24, 1910. On April 2 eighty shares of 1*l.* each were allotted to him, in respect of which he paid 60*l.* On August 17 he gave notice to the company rescinding his contract to take the shares on the ground of misrepresentation in the prospectus. On October 4 the company sent to the shareholders, including the plaintiff, notice requiring them to pay the balances due upon their shares. On October 8 the plaintiff issued a writ against the company claiming (inter alia) (1.) a declaration that the plaintiff was induced to take the shares by misrepresentations and non-disclosure of material facts, (2.) rescission of the contract to take the shares, and (3.) repayment of the amount paid for the shares with interest. On November 1 the defendant company gave notice to the plaintiff that if the unpaid call on his shares was not paid by November 17 the shares would be liable to be forfeited.

On November 7 the plaintiff applied to Lush J. at chambers for an injunction restraining the defendant company from making any call in respect of the shares registered in the plaintiff's name, and also from forfeiting the shares pending the trial of this action. Lush J. dismissed the application.

The plaintiff appealed.

C. A. 1910

JONES v. PACAYA RUBBER AND PRODUCE COMPANY, LIMITED.

Gore-Browne, K.C., and *E. G. Palmer*, for the plaintiff. It cannot be denied that there is here a genuine question for trial, and if the defendant company are allowed to forfeit the shares at the present time, that will be in effect an immediate decision of the question in favour of the defendant company. The shares ought, therefore, to remain in existence until the trial. At chambers there was a discussion whether the decision of Chitty J. in *Ripley* v. *Paper Bottle Co.* (1) or the decision of Neville J. in *Lamb* v. *Sambas Rubber and Gutta Percha Co.* (2) ought to prevail, and Lush J. appears to have followed the earlier case; but his attention was not drawn to the case of *Charron, Ld.* v. *Indian Motor Taxi-Cab Co.* (3), decided in the Court of Appeal on July 25, 1910. In that case the plaintiff was claiming the rescission of a contract to take shares, and the Court restrained the defendant company pending the trial from forfeiting the shares, on the terms of the plaintiff paying the amount of the call into Court.

Astbury, K.C., and *Drucquer*, for the defendant company. The proper order to be made in this case is the order that was made in *Lamb* v. *Sambas Rubber and Gutta Percha Co.* (2) and in *Charron, Ld.* v. *Indian Motor Taxi-Cab Co.* (3); but what the plaintiff is seeking to do is to obtain an injunction without bringing the money into Court.

[*Gore-Browne, K.C.* The plaintiff is, and always has been, ready to bring the money into Court.]

If that is so, the defendant company do not resist the granting of the injunction.

BUCKLEY L.J. On March 31, 1910, the plaintiff applied for 100 shares in the defendant company, and eighty 1*l.* shares were allotted to him in respect of which he has paid 60*l.* On August 17 he gave notice to the defendant company rescinding the contract to take the shares on the ground of misrepresentations in the prospectus of the company. On October 4 notice was given by the defendant company to the plaintiff requiring him to pay the balance due on his shares. On October 8 the

(1) 57 L. J. (Ch.) 327. (2) [1908] 1 Ch. 845.
(3) Not reported.

plaintiff issued a writ against the defendant company claiming a declaration that the plaintiff had been induced to take the shares by misrepresentations, rescission of the contract, and repayment of the money paid thereunder. In November the company gave notice that in default of payment the shares would be liable to be forfeited. The plaintiff now asks the Court to grant an injunction until the trial to restrain the defendant company from forfeiting the shares. The question is, there being certainly a case to be tried, what is the proper order to make? In all cases of applications for interlocutory injunctions the governing principle is that pending the settlement of the dispute between the parties the Court will as far as possible keep matters in statu quo. There are two possible results to the present action. First, it may be that the plaintiff's contention will prove to be right and that he will become entitled to have the contract rescinded. Rescission of a contract involves the giving back of the property obtained under it, and the repayment of the money paid. If the plaintiff is successful in his claim for rescission, he will be entitled to call upon the defendant company to repay him the 60*l.* which he paid for the shares; and he will have to return the shares. He will be entitled to refuse to give up the shares until he has been repaid the money. To carry this out it is essential that the shares shall remain in existence as unforfeited shares until the question as to the plaintiff's right to rescission has been determined. Let us suppose that the property in question was not shares in a company, but a picture. Could the vendor be heard to say "The purchaser says the picture is not his. I, the vendor, think it would be better to burn it. I have another picture which I can sell better if this is destroyed. Let us burn it first, and discuss whose property it is afterwards"? That would be absurd, but it is in effect what the defendant company were contending in the present case. Further, if the plaintiff is right, the shares are not effectually his property; he is entitled to throw them back on the company. How can the company forfeit, that is to say destroy, adversely to the plaintiff, something which the company say is, but he says is not, his property, unless he makes a payment, which, upon the hypothesis that it is not his property, he is not liable to make?

C. A. 1910

JONES v. PACAYA RUBBER AND PRODUCE COMPANY, LIMITED.

Buckley L.J.

Secondly, suppose the plaintiff turns out to be wrong, and that the defendant company ought to be paid the calls, with interest. It is impossible to say until the trial that the company are entitled to have that money, and, therefore, it is equally impossible to say at present that they can have that which is the consequence of default in paying the money, that is, forfeiture. To say that the company are so entitled is presently to determine in their favour the question which is to be decided at the trial. Therefore, whichever may be the ultimate result of the action, the shares ought to remain in existence pending the trial.

The case which always gives rise to difficulty in these cases is the decision of Chitty J. in *Ripley* v. *Paper Bottle Co.* (1), where he said: "If the plaintiff moved as a shareholder, the company's answer was that he was bound by his contract to pay the calls on the shares, and in case of default must suffer the penalties prescribed by the articles of the company. If, however, the plaintiff took the position that the contract was void on the ground of misrepresentation, it was wholly immaterial to him whether the shares were declared forfeited or not." I do not agree that it is immaterial to the plaintiff whether the shares are forfeited or not. If a purchaser of shares takes up the position that the contract of purchase is void on the ground of misrepresentation, it is most material that the shares should not be forfeited before that question has been settled, because, as I have said, the purchaser, if he proves to be in the right, is entitled to keep the shares, with such value as they possess as partly-paid shares, until the company have repaid the purchase-money. *Ripley* v. *Paper Bottle Co.* (1) was not followed by Neville J. in *Lamb* v. *Sambas Rubber and Gutta Percha Co.* (2) For my part I am disposed to go further than Neville J. did in that case; he seems to have treated the question as one of discretion. All injunctions are in one sense a matter of discretion, but it is matter of right that upon proper terms the property shall be maintained in statu quo pending the trial. This question also appears to have come before this Court in a case of *Charron, Ld.* v. *Indian Motor Taxi-Cab Co.*, which has not been reported, and I think that if that case had been cited

(1) 57 L. J. (Ch.) 327. (2) [1908] 1 Ch. 845.

to Lush J. he would probably have decided to grant the injunction.

The plaintiff has agreed to pay the money into Court, and therefore the order for an injunction will go on terms of payment into Court. In these circumstances it becomes unnecessary to say what would have been the proper order if the plaintiff had not been willing to pay the money into Court. I must not be understood as saying that it necessarily follows that in that case a different order would have been made.

The appeal must be allowed with costs.

KENNEDY L.J. I agree.

Appeal allowed.

Solicitors for plaintiff: *Mills, Curry & Gaskell.*

Solicitors for defendant company: *Jenkins, Baker, Reynolds & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

KINAHAN & CO., LIMITED *v.* PARRY AND OTHERS.

Principal and Agent—Undisclosed Principal—Manager of Hotel—Licence in Name of Manager—Unauthorized Purchase by Manager—Liability of Owners.

APPEAL from the decision of a Divisional Court (Pickford J. and Lord Coleridge J.), reported [1910] 2 K. B. 389.

The action was brought in the Cardiff County Court to recover the price of whisky supplied at a hotel of which the defendants were the owners. The defendants had appointed a manager of the hotel, in whose name the licence was taken out, and whose name appeared over the door as the licensee. Express instructions had been given by the defendants to the manager to order spirits from a particular brewery (with which the plaintiffs were in no way connected) and from no other place. The manager ordered the whisky in question from the plaintiffs, who gave credit to the manager only; the whisky

C. A. 1910

KINAHAN & Co., LIMITED v. PARRY.

was delivered at the hotel. At the trial in the county court the deputy county court judge nonsuited the plaintiffs; but the Divisional Court, upon the authority of *Watteau* v. *Fenwick* (1), reversed his decision and entered judgment for the plaintiffs. The defendants appealed.

John Sankey, K.C. (*St. J. F. Williams* with him), for the defendants.

McCall, K.C., and *E. G. Palmer*, for the plaintiffs.

The COURT (Vaughan Williams L.J., Buckley L.J., and Kennedy L.J.) held that there was no evidence that the manager was in fact the agent of the defendants in the particular transaction or that the whisky was supplied for the use of the hotel and not to the manager personally, and that therefore no question as to the application of the law of principal and agent arose in the case. They therefore entered judgment for the defendants.

Appeal allowed.

Solicitors for plaintiffs: *Mills, Curry & Gaskell, for J. T. Phœnix, Cardiff.*

Solicitors for defendants: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

(1) [1893] 1 Q. B. 346.

W. J. B.

[IN THE COURT OF CRIMINAL APPEAL AND IN THE HOUSE OF LORDS.]

1910
Dec. 15.

THE KING . . . . . APPELLANT;

AND

WILLIAM HENRY BALL . . . . . RESPONDENT.

THE KING . . . . . APPELLANT;

AND

EDITH LILIAN BALL . . . . . RESPONDENT;

Criminal Law (Appeal) — Incest — Evidence to prove previous Relations — Admissibility — Punishment of Incest Act, 1908 (8 *Edw.* 7, *c.* 45), *ss.* 1, 2 — *Conviction quashed — Appeal to House of Lords — Application to Attorney-General for Certificate — Power of Court as to Custody of Defendant — Reversal of Order of Court of Criminal Appeal — Power of Court to restore Conviction — Practice of the House of Lords — Printing Papers — Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1, *sub-ss.* 6, 7; *s.* 4, *sub-s.* 2; *and s.*

There being no rules of the House of Lords in respect of criminal appeals, the House on presentation of such an appeal will order the same to be read and prosecuted subject to such standing orders as may be applicable thereto and to the requirement that the respondent to such an appeal shall "lodge a case forthwith in answer thereto"; and the House will accept typewritten copies of the papers necessary to the disposal of the appeal, the petition of appeal alone being printed.

The defendants, who were brother and sister, were indicted under the Punishment of Incest Act, 1908, for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the defendants were seen together at night in the same house, which contained only one furnished bedroom; and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of the defendants with the view of shewing what were the relations between them. This evidence was objected to, but was admitted. The evidence was to the effect that the male defendant in November, 1907, took a house to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth, describing herself as the mother and the male defendant as the father. The defendants having been convicted, they appealed, and the Court of Criminal Appeal quashed the conviction and directed a "judgment and verdict of acquittal to be entered," on the ground that

1910

REX
v.
WILLIAM HENRY BALL.

REX
v.
EDITH LILIAN BALL.

the evidence objected to was not in the first instance admissible, and that nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal:—

Held by the House of Lords, reversing the order of the Court of Criminal Appeal, that the evidence objected to was admissible on the issue; for the object of that evidence was to establish that the defendants had a guilty passion towards each other and to rebut the defence of innocent association as brother and sister.

Held by the Court of Criminal Appeal, that the Court has no power to hold a defendant, whose conviction has been quashed, to bail or to keep him in custody pending an application by the Director of Public Prosecutions or the prosecutor to the Attorney-General, under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, for his certificate that the decision of the Court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought to the House of Lords, or pending an appeal if the certificate is granted.

Held, also, by the Court of Criminal Appeal, that the Court had power to give effect to the decision of the House of Lords by making an order dismissing the original appeal against the conviction and restoring the conviction, and to issue a warrant for the arrest of the defendant who had been discharged from custody.

[For the full report see [1911] A. C. 47.]

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 29, 30;
Dec. 1.

WHITEHORN BROTHERS *v.* DAVISON.

Contract—Fraud—Sale of Goods—Voidable Contract—Pledge by Purchaser—Transferee in Good Faith and without Notice—Onus of Proof—Criminal Law—Larceny by a Trick—Goods on Sale or Return—Power given to pass Property in Goods—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 23.

Where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, and, before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the onus lies on the seller who seeks to avoid the sale, and recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith.

Semble that, where the owner of an article is induced, by a false representation made by another with fraudulent intent that he has a customer who desires to purchase such an article, to deliver the article to that other on sale or return for the purpose of his endeavouring to get the supposed customer to buy it from him, the case is one not of larceny by a trick, but of obtaining goods by fraud.

Application for judgment or a new trial in an action tried by Bray J. with a jury.

The action was for the recovery of a pearl necklace alleged to belong to the plaintiffs, and to be wrongfully detained by the defendant. (1)

The plaintiffs were manufacturing jewellers, and the defendant was a pawnbroker. On July 31, 1909, being the Saturday before the August Bank Holiday in that year, one Bruford, whom the plaintiffs knew as a jeweller and dealer in pearls, asked a member of the plaintiffs' firm, named Bakewell, on the telephone whether the plaintiffs had in stock a two-row pearl necklace at the price of about 1000*l.* Bakewell replied that they had not, but they had a three-row pearl necklace at 1400*l.* Bruford said that he had a demand from a very good client of his in the country, and, as he was sending others to this client, he would like to include the three-row necklace. The plaintiffs

(1) The claim was framed, alternatively, in detinue or trover, but the plaintiffs' counsel elected to rest the plaintiffs' case on the claim in detinue.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

thereupon sent the three-row necklace, which was the subject-matter of the action, to Bruford, with what was spoken of as an "approbation note" in the following terms:—"London, 31/7/1909. Whitehorn Brothers, 19, 20, and 21 Featherstone Buildings, Holborn, W.C. On sale or return: Mr. Bruford, 56, Maddox Street, W. Necklace. Pearl, 3 row. [Then followed further description and price of the necklace.] Net cash." On August 5 Bruford pledged the necklace so sent him with the defendant Davison as security for an advance of 875*l.* made to him by the defendant, and also as a collateral security for payment of all other advances made by the defendant to him and of all debts then or thereafter owing to the defendant from him. The plaintiffs made inquiries of Bruford through the telephone, on several occasions at the end of the week ending August 7 and during the next week, as to what he had done about the necklace, and he answered to the effect that he had not yet heard from his client. At the end of the second week he telephoned to the plaintiffs that his customer had selected the necklace, that he saw that the plaintiffs had marked it "net cash," but his customer, who was a very sound and good man, was in the habit of taking six months' credit on an open account. Bakewell thereupon went up to Bruford's place of business, when Bruford repeated what he had said about his customer. It was arranged that Bakewell should consider the matter till Monday, August 16, and on that date he telephoned to Bruford that it was the first transaction between them, and, as it was for such a large amount, the plaintiffs wished to make it a cash transaction, and, in order to offer him an extra inducement to pay cash, they would allow him 4 per cent. off the amount. Bruford in answer said that he would consult his customer and let them know. Bakewell going away for his holiday, the matter was subsequently taken up by one Whitehorn, another member of the plaintiffs' firm, and various conversations took place between him and Bruford, who represented that the necklace had been sold to a customer, and that he practically could not approach him to insinuate any question as to his bona fides by asking him for cash. The result, in substance, of further negotiations ultimately was that the necklace was

invoiced by the plaintiffs to Bruford as sold to him on August 20, 1909, and the plaintiffs took two bills from him for the price, dated September 1, 1909, one for 750*l.* at five months, and the other for 750*l.* at six months. These bills were afterwards dishonoured, Bruford having absconded. The defendant made a further advance on a pledge of goods to Bruford on September 10, 1909. The plaintiffs subsequently demanded the pearl necklace from the defendant, who refused to give it up. During the examination and cross-examination of Bakewell, who was called as a witness for the plaintiffs at the trial, questions were asked of him, and a discussion took place, as to the trade meaning of the term "net cash" in an approbation note such as was sent with the necklace, the case sought to be made by witnesses for the plaintiffs being that it meant that the property in the article sent on sale or return was not to pass from the plaintiffs until they had received cash. In the course of the discussion the learned judge put to the witness Bakewell the following questions to which the following answers were given. Question: "Upon the terms upon which you parted with this necklace to Bruford would the property pass to Bruford without your receiving the cash?" Answer: "No." Question: "Was it your intention that the property should pass to Bruford without receiving cash?" Answer: "Not without receiving the money." When summing up to the jury, the learned judge, in leaving to them the second of the three questions which he left to them as after mentioned, told them, in substance, that the answers of the witness to the before-mentioned questions were not conclusive at all, because they had to look not merely at the intention of the plaintiffs, but at the intention of both parties, and they must consider whether upon the evidence the trade meaning of the term "net cash" would convey to the person receiving the approbation note the meaning that the property in the necklace was not to pass till the plaintiffs had received cash.

The transaction of pledge by Bruford was entirely carried out with the defendant's manager, the defendant being an invalid at the time. The manager was called as a witness at the trial, and gave evidence as to the details and circumstances of the pledge on August 5, 1909, and various other business transactions,

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

in the way of pledges and sales of jewellery, which he had had with Bruford, whom he had known for some time in business. He stated that he had made divers advances to Bruford on pledges of jewellery before August 5, the first of such advances being on April 22. The total amount of such advances remaining unpaid on August 5 appeared to have been something like 3000*l*. The reason Bruford gave to him for requiring these advances was that he had sustained a heavy loss through a firm who were his debtors not meeting their liabilities to him, and the witness said that he had never had any reason to suspect Bruford, and had no suspicion that there was anything wrong when making the advance on the necklace. (1)

When summing up to the jury, the learned judge, in leaving to them the last of the three questions which he left to them as after mentioned, made the following observations: "It is for the defendant to prove that he did advance money on the necklace in good faith and without notice of Bruford's fraud; that he had not any particular notice of this particular fraud I think is pretty clear, but what the plaintiffs say is this; that he did not take this in good faith: they say that he must have known, and you have a right to infer that he must have known: they suggest that he must have known of it by the large sums that he had out: he must have known there was a doubt whether Bruford had really these goods or not; whether he was really the owner of the goods and had the right to pledge them or not, and, that being so, he abstained and intentionally abstained from making any inquiries at all."

The learned judge left the following questions to the jury, which they answered in the following manner:—1. Did Bruford obtain possession of the necklace by fraud with the intention at the time of stealing it? Answer: Yes. 2. Was it one of the terms of the sale or return transaction of July 31 between the plaintiffs and Bruford that the property in the necklace should

(1) The details of the evidence of this witness, which was lengthy, are not material to the points of law in respect of which the case is reported, but they, of course, formed the subject of discussion in reference to the question whether judgment should be entered for the defendant or a new trial should be ordered.

not pass until the plaintiffs were paid cash? Answer: Yes. 3. Did the defendant advance money on the necklace in good faith, and without any notice of Bruford's fraud, (*a*) on August 5? No: (*b*) on September 10? No. Upon these findings the learned judge gave judgment for the plaintiffs.

The defendant applied for judgment or a new trial on the grounds (1.) that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of the evidence; (2.) that on the facts proved or admitted Bruford obtained the said necklace by false pretences; (3.) that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences; (4.) that, upon the true construction of the plaintiffs' approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words "net cash" and in leaving it to the jury to say what the words "net cash" meant, and that he misdirected the jury as to the effect of the said approbation note; (5.) also that the learned judge misdirected the jury (*a*) in not telling them that the invoicing and sale of the necklace by the plaintiffs to Bruford, and the taking by them of his acceptances for the price after the pledge to the defendant, completed the defendant's title, and vested the property in the necklace in the defendant; (*b*) in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on August 5, 1909, and September 10, 1909, he acted in good faith and without notice of Bruford's fraud, and that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud, and intentionally abstained from asking questions; (*c*) in not properly directing the jury as to what constituted fraud or bad faith, or absence of good faith, and as to the mode in which and the evidence on which the jury could

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

find that the defendant acted in bad faith; (6.) that the findings of the jury in answer to the second and third questions left to them by the learned judge were against the weight of the evidence.

J. R. Atkin, K.C., and *C. L. Attenborough*, for the defendant. The transaction by which Bruford obtained possession of the necklace could not amount to larceny by a trick. Larceny by a trick is where the owner of a chattel is induced to part with the possession of it by a trick, but does not intend that the property in it should pass. Where the owner parts with possession of the chattel to another person upon such terms that he gives to that person a power to vest the property in himself or a third person, as in the case of an ordinary "sale or return" transaction, or where the bailee of the chattel is intended, as in the present case, to have power to sell it on his own account to a customer so as to pass the property to him, the transaction cannot be larceny by a trick, but may amount to obtaining goods by false pretences. [They cited on this point *Kirkham* v. *Attenborough* (1); *Weiner* v. *Gill.* (2)] There was really no evidence to support the finding of the jury on the second question left to them, and, if there was, their finding is against the weight of the evidence. But, in reality, the question whether there was larceny by a trick, and the question as to the effect of the term "net cash," both became immaterial in this case, because the property in the necklace passed to Bruford by the subsequent transaction by which bills were taken for the price. The effect of that transaction clearly was that the necklace was sold to him on credit, and the property in it passed to him. His title would then feed the title of the defendant. It may be admitted that the sale to Bruford might be voidable on the ground of fraud as against him, but it was not void; and if, before its avoidance, he had passed the property in the necklace to a transferee for value who took it in good faith, and without notice of the fraud, it could not be avoided as against such a transferee: see *Parker* v. *Patrick* (3); *Stevenson* v. *Newnham* (4); *White* v. *Garden.* (5) The whole

(1) [1897] 1 Q. B. 201.
(2) [1906] 2 K. B. 574.
(3) (1793) 5 T. R. 175.
(4) (1853) 13 C. B. 285.
(5) (1851) 10 C. B. 919.

question therefore comes to be whether the title of the defendant can be avoided on the ground that he took the title to the necklace which prima facie passed to him otherwise than in good faith, or with notice of the fraud. There was really no evidence sufficient to support the finding of the jury upon this question, or at any rate it was against the weight of the evidence; but in any case their finding cannot stand, because the learned judge misdirected them by telling them that the onus of proving that he took the necklace in good faith and without notice rested on the defendant. It is submitted that this was a misdirection. The general rule of law, by which a person is to be presumed innocent of crime or fraud until he is proved to be otherwise, applies, and it cannot be that in such a case the onus lies upon the defendant of proving that he is innocent. The onus of proof must lie on the plaintiffs, who are seeking to avoid the prima facie good title by which the property in the necklace, that was until avoidance of the transaction vested in Bruford, passed to the defendant. In the case of bills of exchange, by s. 30, sub-s. 2, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), where the acceptance, issue, or subsequent negotiation of the bill has been obtained by fraud, the onus is, no doubt, thrown on the holder of shewing that, subsequently to the alleged fraud, value has in good faith been given for the bill: see *Tatam* v. *Haslar*. (1) But prior to that Act it seems to have been a moot point whether, on the question whether the holder had taken the bill in good faith or otherwise, the onus lay on him or the other party; and Lord Blackburn left that question open in the case of *Jones* v. *Gordon*. (2) But the case of a negotiable instrument is altogether different from that of a chattel. In the case of the latter ex hypothesi the property has passed, subject to the possibility of its being divested by avoidance of the transaction; in the case of a negotiable instrument the question is as to the title to a chose in action, and the question is, not whether a voidable title can be avoided, but whether by the law merchant a person has given to another a title to sue where he had none

(1) (1889) 23 Q. B. D. 345.
(2) (1877) 2 App. Cas. 616, at p. 628.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

himself. [They also cited *Bryce* v. *Ehrmann* (1) ; *Truman* v. *Attenborough* (2); *Load* v. *Green.* (3)]

Rawlinson, K.C., and *Reginald J. White* (*H. Dobb* with them), for the plaintiffs. If the question as to whether the defendant took the necklace in good faith was rightly answered by the jury, then all the other questions become immaterial. It is impossible for the defendant to deny that the necklace was obtained by a fraud on the part of Bruford, and therefore he had at best a voidable title. Assuming that the property in the necklace passed by the subsequent transaction by which bills were taken for the price, that transaction was procured by a continuance of the original fraud and misrepresentation by which possession of the necklace had been in the first instance obtained from the plaintiffs. The defendant's title was therefore voidable, unless he took the necklace in good faith and without notice. That being so, the question is, on whom does the onus lie in such a case? It is submitted that it lies on the defendant. That this is so is recognized by the Sale of Goods Act, 1893, s. 23, which provides that "when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." That Act was a codification Act intended to codify the common law as to the sale of goods. The language of that section clearly indicates that the onus of proof is on the buyer in such a case, it being for him to bring himself within the proviso. The same principle must apply to a pledge. A similar question may arise under the Factors Acts, and in *Oppenheimer* v. *Frazer & Wyatt* (4) such a question under those Acts came before the Court of Appeal. It appears to have been there held that the onus of proof lies on the purchaser of the goods fraudulently sold.

[KENNEDY L.J. A factor is a mere agent, and has no title to the goods.

BUCKLEY L.J. In the present case Bruford had a title to the

(1) (1904) 7 F. 5.
(2) (1910) 26 Times L. R. 601.
(3) (1846) 15 M. & W. 216, at p. 219.
(4) [1907] 2 K. B. 50.

goods, though it was a title which might in certain events be avoided.]

In the case of a bill of exchange, where the acceptance was obtained by fraud, the onus lies on an indorsee of shewing that he gave value in good faith and without notice. It is submitted that this is an a fortiori case as compared with that of a bill of exchange. The property in the instrument passes in the case of a bill of exchange with the right of action, and by the law the instrument is negotiable. If the holder of such an instrument has, where it was originally obtained by fraud, to prove that he took it bona fide for value, a fortiori the onus ought to lie upon the holder of a chattel, which was obtained by fraud from its owner, of proving that he acquired it in good faith. There was evidence here upon which the jury were entitled to find that the defendant did not take the necklace in good faith and without notice of the fraud. Prima facie a man cannot give a better title than he has himself, and a transferee takes subject to infirmities in the title of his transferor: *Kingsford* v. *Merry* (1); *Cundy* v. *Lindsay*. (2)

[BUCKLEY L.J. The last-mentioned case has no application here. There no title passed to the fraudulent vendor, because there never was any contract with him by the original owner of the goods. Here Bruford had a title, though a voidable one.]

It is submitted that the finding that Bruford obtained possession of the necklace by fraud with the intention of stealing it was justified by the evidence, and that the whole transaction, of which the subsequent agreement with regard to giving bills for the necklace was part and parcel, amounted to larceny by a trick and was therefore void: see per Fletcher Moulton L.J. in *Oppenheimer* v. *Frazer & Wyatt* (3); and consequently the property in the necklace never passed to Bruford. What took place after August 5 is immaterial. The larceny was then complete, for it was Bruford's intention to get possession of the necklace and dispose of it dishonestly then and there, as he did, and what took place afterwards was a continuance of the same transaction: *Percy Edwards, Ld.* v. *Vaughan*. (4) The evidence

(1) (1856) 1 H. & N. 503.
(2) (1878) 3 App. Cas. 459.
(3) [1907] 2 K. B. 50, at p. 72.
(4) (1910) 26 Times L. R. 349, 545.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

shewed that the effect of the approbation note was that the property in the necklace was not to pass till the plaintiffs had received the price in cash. The note had the same effect as that in *Weiner* v. *Gill.* (1)

[VAUGHAN WILLIAMS L.J. There was an express stipulation in that case to that effect, but on the ordinary meaning of the terms of the note in this case there is no such stipulation.]

The evidence shewed that the term "net cash" did not merely indicate the time of payment, but meant that the option to take to the goods was only to be exercisable on performance of the condition that net cash was to be paid. The verdict was not against the weight of the evidence on the question of bona fides on the part of the defendant. In any case the evidence raised a question for the jury, and therefore judgment cannot be entered for the defendant. [They also referred to s. 18, r. 4 (*a*), of the Sale of Goods Act, 1893.]

C. L. Attenborough, for the defendant, in reply. Sect. 23 of the Sale of Goods Act, 1893, refers to a sale of goods, not to a pledge of them; but, assuming that it does apply, it was never intended to introduce any alteration into the common law on this subject, and the mere fact that the last sentence of the section is put in the form of a proviso ought not to be taken as an indication that it was intended to throw the onus on the purchaser of proving that he bought in good faith. There was really no evidence of bad faith on the part of the defendant, and, if the onus did lie on him, he amply satisfied it. [He cited *Oppenheimer* v. *Attenborough* (2); *Bailey* v. *Bidwell* (3); *Oakley* v. *Boulton* (4); *Goodman* v. *Harvey* (5); *Moss* v. *Sweet* (6); *Payne* v. *Wilson.* (7)]

VAUGHAN WILLIAMS L.J. In this case the action was originally framed in detinue or trover, alternatively, but the plaintiffs' counsel elected to rest their case upon the claim in detinue. The subject-matter of the action is a pearl necklace, which was

(1) [1906] 2 K. B. 574.
(2) [1907] 1 K. B. 510; [1908] 1 K. B. 221.
(3) (1844) 13 M. & W. 73.
(4) (1888) 5 Times L. R. 60.
(5) (1836) 4 Ad. & E. 870.
(6) (1851) 16 Q. B. 493.
(7) [1895] 1 Q. B. 653; 2 Q. B. 537.

obtained from the plaintiffs by a man named Bruford, who, according to the common admission of both parties, was, up to the time of the happening of the events out of which this action arises, a man of good reputation. Unfortunately this man, who, up to that time, seems, for aught that appears, to have been an honest commercial man, for some reason became short of funds in his business, the reason which he assigned when he pledged the necklace in question being that he was the principal creditor of some people in the jewellery trade who had not paid what they owed him; and, that being so, he obtained this necklace in the manner appearing from the evidence. It is contended for the plaintiffs that the necklace was obtained by Bruford from them under circumstances which constituted larceny by a trick. Having regard to the subsequent transaction by which the plaintiffs in fact sold the necklace in question out and out to Bruford, and took two bills, one at five months and the other at six months, for the price of it, I do not think that the question whether there was originally larceny by a trick continues to be of material importance in this case; but I may say, in passing, that, if I had to deal with that question for the purpose of deciding this case, I should have great difficulty in arriving at the conclusion that what Bruford did amounted to larceny by a trick. There was, no doubt, evidence to shew that he did by fraudulent statements persuade the plaintiffs to enter into a contract with him, which, taking the view of it most favourable to them, appears to me to have been a contract under which possession of the necklace was given to him together with an option, within a reasonable time, I suppose, to accept as sold to him the necklace so delivered on sale or return for a price to be paid in cash, or to return the same. That being so, the case is one in which he, undoubtedly, got possession of the necklace by fraud, but it appears to me that he got it under a contract between himself and the plaintiffs. He not only got it under this contract, but, admittedly, the object of that contract was that he should have an opportunity of seeing whether he could sell the necklace to a customer before he made up his mind whether he would accept it on the terms of the approbation note. Under these circumstances

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Vaughan Williams L.J.

I should find it very difficult to arrive at the conclusion that he was guilty of larceny by a trick. I do not, as at present advised, think that it would be stealing, though his conduct would no doubt be fraudulent and dishonest, if he got possession of the necklace from its owners, who were willing to sell it upon the terms which I have mentioned. I think that would constitute obtaining goods by fraud, and not larceny. In such circumstances, it would be under a contract that the possession of the article was obtained, the object of giving that possession being that it should be offered by the fraudulent person for sale by him to any customer of his whom he thought to be likely to purchase it; and I do not think that it would make any difference in this respect that he said that he had such a customer at the moment. I should, as I have already said, feel the greatest difficulty in coming to the conclusion that, when goods were delivered to a person for the purpose of being dealt with as I have described, this could constitute larceny by a trick. Having regard to the conclusion at which I have arrived as to the effect of the subsequent transaction between the plaintiffs and Bruford, I do not think I should be justified in going at greater length into this question. All I will say is that I cannot find in the long series of cases on the subject, beginning with *Parker* v. *Patrick* (1) and coming down to *Cundy* v. *Lindsay* (2), any authority that leads me to the conclusion that, where possession of goods is given under such a contract as in fact existed in the present case, it can be treated as obtained by larceny. It may be treated as obtained by false pretences, but that is a very different thing, because in that case, if the goods are transferred to a third person, he takes under a contract which, though voidable, is not void, and is valid till avoided.

In this case, the necklace having been obtained by Bruford from the plaintiffs on July 31, it was pledged by him with the defendant on August 5. Subsequently the plaintiffs communicated with Bruford on several occasions on the subject of payment for the necklace, with the result, as it appears to me, that, ultimately, they made a contract with him for the sale of the necklace to him out and out on the terms that the two bills were

(1) 5 T. R. 175. (2) 3 App. Cas 459.

to be taken for the price. It is by reason of this event that I have come to the conclusion that the question of larceny by a trick becomes of no importance in this case. The title of Bruford to the necklace was, at any rate for the time being, perfected by that transaction, and would go to feed the title of the defendant, his pledgee, the result being that, if the defendant's title is not vitiated by bad faith on his part or notice, he has a good title to the necklace.

Having said this much, I now propose to deal with the grounds of the present application, and so much of the learned judge's summing up as is necessary to make the notice and grounds of the application intelligible. The first ground of application is "that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of the evidence." The answer of the jury to that question was in the affirmative. As I have before pointed out, the finding of the jury upon that question is not, having regard to the subsequent sale to Bruford, essential to the decision of the case. I very much doubt whether the jury's finding was justified in point of law, and whether they apprehended what is necessary to constitute larceny by a trick. This case, as I have already said, is not one of merely obtaining possession by a trick, but one in which the plaintiffs gave possession of the necklace under such circumstances that they must have intended that it should be exhibited to a customer of Bruford, and that he should have the power, if he chose, of accepting the article which was delivered to him on sale or return, and of transferring the property therein to a purchaser. The second ground of application is "that, on the facts proved or admitted, Bruford obtained the said necklace by false pretences." That it was so obtained on July 31 I entirely agree, and therefore I take no exception to that statement. The third ground is "that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences." As I have already intimated, I think that there is a good deal which might be said in support of that ground. The fourth

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Vaughan Williams L.J.

ground is "that, upon the true construction of the plaintiffs' approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction, or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words 'net cash,' and in leaving it to the jury to say what the words 'net cash' meant, and that he misdirected the jury as to the effect of the said approbation note." These last two grounds really become immaterial upon the view which I take as to the title to the necklace which Bruford got subsequently, and its operation in favour of the defendant. I need not read all the grounds of appeal. I do not think that I need say much about the summing up of the learned judge as regards the effect of the subsequent transaction as giving a title to Bruford, which would enure to the benefit of the defendant, because he really seems to have said nothing on that subject. The next ground I will read is 5 (*b*), namely, that the learned judge misdirected the jury "in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on August 5, 1909, and September 10, 1909, he acted in good faith and without notice of Bruford's fraud." Now, pausing there, it is, I think, clear, with regard to this ground of appeal, that, when you have a contract of sale which is voidable on the ground of fraud, or for any other reason, and, before it is avoided by the seller, the buyer, as against whom it could have been avoided, has transferred the subject-matter of the contract to an innocent third person who has given value and has accepted the transfer without either knowledge of anything wrong, or any knowledge of such circumstances as might lead him to wish not to make any further inquiry lest he should find that there was something wrong, the contract cannot be avoided as against that person; and I am of opinion that the onus of proving that there are such circumstances as prevent the third person so purchasing from being such an innocent purchaser rests on the plaintiff who seeks to recover the subject-matter of the contract from him, and not on the defendant. I do not think that I need go through the cases cited during the argument at length. But, taking the cases from that of *Parker*

v. *Patrick* (1), before Lord Kenyon, down to *Jones* v. *Gordon* (2), in the House of Lords, I find no trace of any such doctrine as that the onus in such a case lies on the third person so purchasing. The very statement which occurs again and again that in such cases the contract is a voidable and not a void contract, i.e., that it is valid till avoided, seems to me to indicate that the onus of proof for the purpose of avoiding it as against the third person must lie on the person who is seeking to impeach that which up to that time is a valid contract. Common sense appears to me to point to the same conclusion. With all respect to Bray J., I think that his ruling on this point was wrong; but I must say that, after reading the shorthand notes of the trial, I cannot help thinking that this question of the onus of proof was not much, if at all, debated before the learned judge; but I do not think that this is a case in which one can say that, because there was no discussion of the subject, and no objection was taken that the ruling of the learned judge was not accurate, when he was summing up, the defendant is debarred from relying on this ground, for in the speech of the defendant's counsel he appears specifically to have made the point that the onus was on the plaintiffs. Under these circumstances I do not propose to say any more on this ground of appeal beyond pointing out that this is a misdirection which in itself would not only justify us in sending this case down for a new trial, but would make it our duty at any rate to do that. I will now go back to the end of paragraph (*b*) of the fifth ground of application, which alleges that the learned judge misdirected the jury in telling them "that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud and intentionally abstained from asking questions." I have already stated the grounds upon which I think that there must, at any rate, be a new trial, but the question appears to me to arise, in relation to this ground of application, whether the judgment should not be entered for the defendant, and whether there was really any evidence to go to the jury to support their finding on the third question which the judge put to them, namely, "Did

(1) 5 T. R. 175. (2) 2 App. Cas. 616.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Vaughan Williams L.J.

the defendant advance money on the necklace in good faith and without any notice of Bruford's fraud (*a*) on August 5 or (*b*) on September 10?" and to which the jury returned an answer in the negative. It must be remembered that, when they were asked that question, it was upon the basis that the onus of proof of good faith and absence of notice was on the defendant. I think that was wrong, and I propose to deal with the matter on the basis that the onus was on the plaintiffs. In order to prove absence of good faith, you must either prove notice, or the fact that there was dishonesty, or shew that there is evidence that the defendant himself suspected the security which was being offered to him. I really think that, if the jury had been asked whether there was any evidence that the defendant suspected the goodness of the security that he was accepting, they would not have arrived at the answer which they gave. I will not lengthen my judgment by referring in detail to the passage in the judgment of Lord Blackburn in *Jones* v. *Gordon* (1), in which he points out the sort of evidence you must have before you can come to the conclusion in such a case that there is notice or an absence of good faith, but, putting it shortly, it comes to this, that you will be justified in finding that there was notice, or an absence of good faith, if you find anything to shew that the person taking the security made no inquiries about it, or where it came from, because he feared the answer which he might get, and feared that he might get an answer which shewed that something was wrong. [The Lord Justice here discussed the evidence.] I think that there is in this case no evidence to support the finding of the jury on this question, and that under the circumstances judgment ought to be entered for the defendant.

BUCKLEY L.J. Bruford was a pearl merchant. He had for many years before July, 1909, been, and in that month was, in good commercial credit and reputation, but he was, or at any rate in July, 1909, had become, dishonest. These facts are common ground as between the parties in this case. The defendant derives title to the article in question under Bruford. The question is whether the defendant has got a good title.

(1) 2 App. Cas. 616.

The first question upon which I am going to say something, although I do not think that it is really necessary to decide it in this case, is whether there was in July, 1909, larceny by a trick by Bruford. In my opinion there was not. I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the case in *Cundy* v. *Lindsay*. (1) On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this. Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud. One may put the same thing in a different way. A man may steal a chattel, but he cannot steal the power to dispose of a chattel. A man may obtain the grant of a power of attorney by fraud,

(1) 3 App. Cas. 459.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Buckley L.J.

but he cannot steal a power of attorney. He cannot steal a contract; he can only steal a chattel. The particular transaction here was, as I understand it, in substance, as follows. On July 31, 1909, the plaintiffs, the owners of this necklace, sent it to Bruford on sale or return, and, upon the evidence, their intention appears to have been this: they were not intending to pass the property to him; but they were intending to hand him possession of the necklace, believing, by reason of what he falsely told them, that he had a customer who wanted to buy such a necklace, and they were giving him authority to hand over the necklace, and to pass the property in it, to that supposed customer. They were sending him the necklace on approbation, and making him this offer: "You may have possession of this article, and, if you are so minded, you may pass the property in it to the customer whom you tell us you have"; but there was no present passing of the property to him. It was therefore such a case as I have described as being one where the owner voluntarily parts with the possession of goods, and intends to confer a power to pass the property. That to my mind is not larceny by a trick, but is obtaining goods by false pretences.

But I will assume now that I am wrong as to this. The next material step is that, subsequently, there was a new transaction between the parties, and the way in which it came about was as follows. Bruford said that his customer was a very good customer, but he could not afford to press him for money; he could not insinuate that he could not let the customer have the necklace until he paid cash; and therefore he, Bruford, wished to have it on credit. The plaintiffs assented to that, and they ultimately sold him the necklace out and out upon the terms that he should give two bills for the price, one at five months and the other at six months. The position, therefore, is that, assuming that there was originally larceny by a trick, and that Bruford had stolen the necklace, he comes to the plaintiffs, who do not know that, and asks them to sell the necklace to him, and they accordingly do so, and he pays them the price by bills. After that, it appears to me immaterial for the present purpose whether he obtained possession of the goods originally by larceny or not. The defendant's title is obtained in this way. Upon the

hypothesis that the original transaction was a larceny, then, on August 5, when the necklace was pledged with him, he had no title to it at all. If Bruford had stolen it, he had that which is sometimes incorrectly called a void title, but which is really no title at all; Bruford could not then give the defendant a title. Upon this hypothesis the defendant on August 5 got no title, but afterwards, when Bruford became the owner of the necklace, and had the property in it, his title would go to feed the defendant's title; and as from that time it appears to me to be immaterial whether Bruford originally stole the necklace or not. From that time the defendant had a title. The subsequent transaction of sale to Bruford may have been, and I think it was, obtained by fraud, and, therefore, that which the defendant had then got was a title which would be voidable as against Bruford, his pledgor, and as against himself, if he was not a transferee for value in good faith and without notice. The whole question in this case, therefore, to my mind, resolves itself into this—whether there was or was not larceny by a trick, can the title which the defendant obtained be set aside at the suit of the plaintiffs except upon the ground that the defendant was not a transferee for value in good faith and without notice? By a "voidable title" is meant a title which, if the person entitled to avoid does not elect to avoid it, will be a good title. It is a good title until a person entitled to avoid elects to avoid it, and does avoid it, in which case that which was a title, though a voidable title, becomes an avoided title. Now, when a person comes to displace another from the enjoyment of property, which property is in him by virtue of a title, though a voidable title, I apprehend that, on every principle, it lies upon the plaintiff, who comes to displace that title, to prove all the material circumstances which go to shew that he is entitled to retake that property from the person who has got it. I will not elaborate that proposition, because I think that there is ample authority for it. I can see no ground for arguing the contrary except that afforded by the form of the language used in s. 23 of the Sale of Goods Act, 1893. I agree that that language does raise a question which is capable of argument. The words of the section are these: "When the seller of goods has a voidable

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Buckley L.J.

title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." I agree that the fact that these latter words are in the form of a proviso gives rise to an argument that, under the circumstances mentioned in the section, it is for the buyer to prove that he comes within them, and not for the person who is seeking to avoid his title to prove that he does not, but on consideration I have come to the conclusion that this is not the meaning of the section. I think it merely means that in the one event the buyer is to have a good title, and in the other event he is not to have a good title, and throws no light on the question upon whom the onus of proof lies. I think, therefore, that the onus was on the plaintiffs of shewing that the facts were such that they could avoid the good title which prima facie the defendant had got. If the defendant's title was voidable, it was for the plaintiffs to avoid it. That being so, and the onus, therefore, being upon the plaintiffs to prove that the defendant took otherwise than in good faith or with notice, I think myself that there was no evidence to support the answer given by the jury to the third question put to them. Under those circumstances I think that the judgment below ought to be discharged and judgment ought to be entered for the defendant.

KENNEDY L.J. In this case I agree that the judgment given below cannot stand, but I am unable on the whole to come to the conclusion that we ought to enter judgment for the defendant. In my opinion there ought to be a new trial; but, as my brothers think otherwise, judgment will be entered for the defendant.

Many very interesting questions have been raised during the argument, the decision of which would, if there had been a new trial, have been very important as a guide to the judge at the trial in future, and as to which I desire to state my view. I need not recapitulate the general circumstances of the case. There is no dispute as to the fraudulent character of the transactions with regard to the necklace in question so far as Bruford is concerned. I will proceed to deal with the questions which

appear to me to arise upon those transactions in the order in which they were dealt with in the summing up of the learned judge.

The first question is, What was the nature in point of law and fact of the transaction into which Bruford entered with the plaintiffs in the first instance on July 31? The views which the plaintiffs on the one side and the defendant on the other put forward are, when contrasted together, respectively these. The plaintiffs say that they never then entered into a contract for sale of this necklace. We all know—and there is legislation on the subject—what is the nature of the ordinary transaction of sending goods on approbation, or on sale or return. What the plaintiffs say is that there was in this case, at the most, a contract of bailment, under which they delivered the necklace to Bruford with an opportunity of making a contract for sale of it, but only this contract, namely, a contract in which it was to be a condition precedent to the passing of the property from the plaintiffs that cash should be paid to the plaintiffs for the necklace. That is the plaintiffs' contention. The defendant's contention is that there was a contract of bailment with the opportunity of making a contract for sale of the necklace, and, therefore, passing the property in it, with a term that the buyer should pay net cash, a term on which, of course, he could be sued, if he did not comply with it, but the fulfilment of which was not a condition precedent to the passing of the property in the necklace. As to which of these two positions was the true one, I think the jury had to decide, subject, of course, to a proper direction by the judge. It is a somewhat startling suggestion that, without more explicit language in the contract or memorandum, there should be introduced so important a term as that the property should not pass unless and until cash was paid to the plaintiffs, but it was said at the trial that the recognized meaning of the words "net cash" in this trade was that the property should not pass unless upon a contract fulfilled by the actual payment of cash as a condition precedent to the passing of the property. I do not say that there was no evidence upon which the plaintiffs' view of the matter in this respect could properly be left to the jury; but, if it had been necessary

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Kennedy L.J.

to decide the case on this point, I should not, on a point so important with regard to the suggestion of larceny by trick, have been satisfied to leave the case where it stands upon the finding of the jury; because, with all respect to the learned judge, I think that the question which he put to the witness—namely, "Upon the terms upon which you parted with this necklace to Bruford would the property pass to Bruford without your receiving the cash?"—was not a right question to put, inasmuch as it was a question as to a consequence of law. A little later he put the question "Was it your intention that the property should pass to Bruford without receiving cash?" And to this the witness answered "Not without receiving the money." I do not think myself that either of these were questions which ought to have been put, the first, as I have said, being a question as to whether the terms of the contract included a legal consequence, and the other being a question which asked the witness's own intention in making the contract. The effect of a contract is to be inferred by the tribunal from the words used orally, or in writing if there is a written contract, construed with regard to the circumstances of the case. It is quite true that, as one would naturally expect, when the learned judge came to sum up, he distinctly explained to the jury that they must not regard the witness's statement of his intention as at all conclusive, but I cannot help feeling that it might be difficult for the jury altogether to divest their minds of the effect produced upon them by the answers to those questions. I think that there might be a serious question whether there ought not to be a new trial on this point, if the finding of the jury upon it became material.

But then this further question arises. Assuming for this purpose that the plaintiffs' contention is right, and that, according to the terms of the contract as understood by the jury, this was a bailment, or handing over of the necklace, on the terms that the property in it should not pass unless and until the plaintiffs received the price in cash, nevertheless, as it is quite clear that Bruford falsely represented to the plaintiffs that he was desirous of buying for the purpose of reselling to a customer, if the latter approved of the article, and that the

plaintiffs themselves gave to Bruford possession of the necklace upon that basis, it seems to me that, even upon the plaintiffs' own view of the transaction, it would not be right to describe it as amounting to larceny by a trick. I will not go in detail into the arguments, interesting though they are, as to what is larceny by a trick, and what merely amounts to obtaining a contract by fraud—I would not limit it to false pretences—but I hold the opinion which Channell J. elaborated in his judgment in the case of *Oppenheimer* v. *Frazer & Wyatt*. (1) I will not read what he there said, as I think it is under the circumstances of this case unnecessary to decide this point, but, if it were necessary to do so, I should concur in the view which he there expressed, especially at pp. 526, 527 of the report of his judgment in the *Law Reports*. I think that, for the purpose of testing the rights of third persons who may have honestly become transferees of goods in a case such as this between the time of the fraudulent transaction and the time when it is sought to be avoided by the person who has been defrauded, it is not right, even on the plaintiffs' view of the transaction, to treat it as larceny by a trick. With regard to larceny by a trick I do not desire to add anything to the statement of the law in the passage to which I referred in the same case in the Court of Appeal (2) from Pollock and Wright on Possession in the Common Law, pp. 218, 219. The matter is dealt with, and the legal principles involved are fully discussed, in that passage, and I am willing to adopt what is said there as an accurate expression of the law with regard to the question what constitutes larceny by a trick. I do not think that a case such as this, where, even on the plaintiffs' view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described for the purposes of such an action as the present as larceny by a trick, resulting in a void, and not a merely voidable, contract. It was intended by the plaintiffs that Bruford should sell himself, as is shewn by many passages in the evidence for the plaintiffs. It seems to me impossible

(1) [1907] 1 K. B. 519. (2) [1907] 2 K. B. 50, at p. 77.

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Kennedy L.J.

to say that this is a case in which there is no contract at all beyond a mere bailment: it was not a case of a mere bailment; not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person. I think, as I gather Channell J. thought, that where you have a case like *Hardman* v. *Booth* (1) or *Cundy* v. *Lindsay* (2), i.e., a case where, though there may be an apparent contract, there is no real contract as the result of the transaction, because there is no person with whom a contract is really made by the seller at all, in such a case the mere bailment of the goods with the consent of the owner does not prevent the transaction from being larceny by a trick; but, when the facts are such as I have described them in the present case, I think that there is no evidence to support a finding by the jury that there was larceny by a trick. But I think that, as has been pointed out, that finding becomes immaterial, having regard to what subsequently happened. I agree that the fraud of Bruford continued and that the subsequent transaction of sale was induced by that fraud, inasmuch as the plaintiffs were still told by him that he had a customer, who was going to pay for the necklace, and that it was for the customer's convenience that cash was not to be paid; and therefore that transaction was voidable on the ground of fraud. But that second transaction was unquestionably a sale, as appears clearly from the plaintiffs' books, and from the fact that they took bills for the price of the necklace. It is quite impossible on the evidence to say that that transaction did not amount to a sale, though I agree that it was a sale induced by the fraud of Bruford, and therefore voidable as against him. It was, subject to the right of the plaintiffs to cancel or avoid it as against him by reason of its being induced by fraud, a sale to Bruford, which gave him all the rights of a purchaser, and the benefit of which would, as it seems to me, enure to any innocent purchaser to whom Bruford, at any date prior to the plaintiffs' electing to avoid it, might transfer the necklace. I cannot find in the summing up any reference to the effect upon the rights of the parties of this very important transaction, by which the plaintiffs sold the necklace to Bruford

(1) (1863) 1 H. & C. 803. (2) 3 App. Cas. 459.

and took payment in bills for the price; and I do not under these circumstances feel satisfied that the jury came to a right conclusion on the case, or that the questions left to them were sufficient to determine it.

The question remains as to the onus of proof and the effect of the Sale of Goods Act, 1893, s. 23. It was assumed, I think, in the last judgment that that section applies to this case. I feel by no means sure that it does. So much the worse for the plaintiffs, if it does not, because then we are thrown back on the common law, and in that case the difficulty which depends upon the words in question being in the form of a proviso does not arise. The section in terms deals with the case of a "buyer" acquiring a title to goods, and it may be that the case of a pledgee might be different. It is not necessary to decide that question, but the inclination of my mind is to say that the present case depends upon the common law; and, if so, I think the true rule of the common law as regards burden of proof in a case of this kind is that a plaintiff, who comes forward to deprive another of his title to property that has been acquired by him before the plaintiff has elected to avoid the transaction out of which that title has arisen, is bound to shew, not only that he himself was originally induced to part with his property by fraud, but also that he is entitled to deprive the defendant of it by proving that he took it otherwise than in good faith or with notice. No authority directly in point has been cited one way or the other. It seems to me that a plaintiff who seeks to avoid the title of a third party in such a case as this must be dealt with upon the basis that prima facie the act of the third party is that of an innocent person, and that he cannot be deprived of that which he has acquired, and must be assumed, in the absence of evidence, to have innocently acquired, without proof that there are circumstances which put him out of the category of an innocent buyer and into that of one who could not have acted honestly in the transaction. I agree with the other members of the Court that the summing up was in this respect materially wrong. Reference has been made on this point to the cases and the law with regard to bills of exchange. It is sufficient for me to say that the question on whom the onus of proof lay in the case of

C. A. 1910

WHITEHORN BROTHERS v. DAVISON.

Kennedy L.J.

a bill of exchange was the subject of disagreement among judges before the Bills of Exchange Act, 1882, as was mentioned by Lord Blackburn in *Jones* v. *Gordon*. (1) The law as regards that question has now been settled by s. 30 of the Bills of Exchange Act, 1882. It seems to me that, in point of principle, there being no authority to the contrary, the correct view is that the onus of proof in this case lay on the plaintiffs, and I cannot therefore, with respect to my brother Bray, concur with the view which he expressed. If the onus of proof was on the plaintiffs, it is quite clear that the finding of the jury on this question cannot stand, because the learned judge directed them that the defendant had got to make out affirmatively that he had acted in the transaction in good faith and without notice.

The one thing upon which I cannot go the full length with my brothers in this Court is this. I am very far from saying that, upon the evidence as it stands, I should have come to the conclusion that, if the onus lay upon the plaintiffs, the defendant's servant was shewn to have been guilty of any bad faith or want of regard for facts which he must have noticed, and which ought to have put him on inquiry; but it is not for me, as I conceive, to put myself in the place of the jury, and, unless it can be said that there was really no evidence in the case on this question for the consideration of the jury upon a proper direction by the judge, I do not think that the Court is justified in entering judgment for the defendant. Upon the whole, without going into details, I think that there were circumstances in the case, putting it generally, such as rendered it one which a judge would not have been justified in withdrawing from the jury. I think that my judgment is entirely in accordance with the judgment of the other members of the Court on all the other points, but I do not myself think that the application ought to result in anything more than a new trial. The judgment of the Court, however, is to the contrary.

Judgment for defendant.

Solicitor for plaintiffs: *Julius A. White.*

Solicitor for defendant: *Stanley J. Attenborough.*

E. L.

(1) 2 App. Cas. 616.

[IN THE COURT OF APPEAL.]

C. A.
1910
Dec. 7.

CARLISLE AND CUMBERLAND BANKING COMPANY *v.* BRAGG.

Contract—Signature to Document obtained by Fraud—Document signed in Ignorance of Contents—Guarantee—Defence of non est factum—Negligence—Estoppel—Proximate Cause of Loss.

The defendant signed a document, which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R. of any sum which might at any time thereafter be or become due from R. to the plaintiffs, a banking company, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of R. to sign the document, without reading it, and not knowing that it was a guarantee, but supposing it to be a document of a different character. Subsequently to the signature of the document by the defendant, R. forged the signature of an attesting witness to it, and handed it to the plaintiffs. The jury, in answer to a question put to them by the judge, found that the defendant was negligent in signing the document:—

Held, affirming the decision of Pickford J., that in an action on the supposed guarantee the defendant was not estopped from denying that he had contracted to guarantee the debt of R., inasmuch as he was under no duty to the plaintiffs in the matter, and the proximate cause of the plaintiffs' loss was the fraudulent action of R. and not the defendant's supposed negligence.

Foster v. *Mackinnon*, (1869) L. R. 4 C. P. 704, discussed.

Application by the plaintiffs for judgment or a new trial in an action tried before Pickford J. with a jury.

The action was upon a document which purported to be a continuing guarantee by the defendant, up to the amount of 150*l.*, of the payment by one Rigg to the plaintiffs of any sum which might at any time thereafter be or become due from him to the plaintiffs on the general balance of his banking account with them.

The defendant in his defence denied that he signed the guarantee upon which the action was brought, and alleged that, if he did, his signature to the same was fraudulently obtained by Rigg, who falsely represented to him that the said guarantee was an insurance paper. The evidence, so far as material to this report, appeared to be, in substance, as follows. The signature to

C. A. 1910

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

the document was in fact the defendant's. Before the document was signed, the plaintiffs had required from Rigg a guarantee of his overdraft with them. On the occasion when the document was signed the defendant and Rigg had been drinking together. Rigg produced a paper, and asked the defendant to sign it; he did not read it to the defendant, or tell him that it was a guarantee. He told the defendant that the paper which the defendant had signed on a previous day had got wet, and blurred in the rain. The defendant did not read the paper which he was asked to sign, and stated in evidence that he did not know that it was a guarantee; that he thought that Rigg was referring to a paper which he, the defendant, had previously signed concerning some insurance matter, and that the paper which he was asked by Rigg to sign was to the same effect as that paper. Rigg, having procured the defendant's signature to the document, subsequently forged the signature of an attesting witness to it, and handed it to the plaintiffs. It was not disputed that Rigg was indebted to the plaintiffs on his banking account to the amount claimed in the action. The questions left by the learned judge to the jury and their answers thereto were as follows: (1.) Was the defendant induced to sign the guarantee by the fraud of Rigg?—Yes. (2.) Did the defendant know that the document which he signed was a guarantee?—No. (3.) Was the defendant negligent in signing the guarantee?—Yes. (4.) Was Rigg the agent of the bank?—No.

Upon these findings the learned judge, on the authority of *Swan* v. *North British Australasian Co.* (1), gave judgment for the defendant.

Langdon, K.C., and *Greer, K.C.*, for the plaintiffs. This case is, in substance, covered by the decision in *Foster* v. *Mackinnon.* (2) In that case Byles J. said, in delivering the judgment of the Court, "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such

(1) (1862) 7 H. & N. 603; (1863) 2 H. & C. 175.
(2) L. R. 4 C. P. 704.

a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force: and it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended." The cases, therefore, in which a man who has signed a deed or contract can be heard to say that it is not his deed or contract, appear to be confined to the cases of a blind man, an illiterate man, and a man who forbears to read the document under circumstances not implying negligence. It is clearly implied that, where a man who is not blind or illiterate negligently forbears to read the document which he signs, he must fail on a plea of non est factum, or that he never made such an agreement. It may be that the true way of looking at such a case is that, though in fact he never made the deed or contract, because he never intended to do so, he is estopped from setting that up as a defence. The judgment in *Foster* v. *Mackinnon* (1) clearly imports that there may be such an estoppel by negligence, because the Court approved of the direction given by Bovill C.J. at the trial to that effect, and sent the case down for a new trial on the questions involved in that direction.

[VAUGHAN WILLIAMS L.J. Must not those observations in the judgment in *Foster* v. *Mackinnon* (1) be read with relation to the fact that the subject-matter of that case was a negotiable instrument?]

The language used seems to have reference to contracts generally.

[KENNEDY L.J. The term "negligence" in this connection imports a duty. To whom was there any duty owing by the defendant in this case?]

There was a duty to the person into whose hands the document might come. The document being a guarantee expressed to be given to the plaintiffs, there was a duty to the plaintiffs.

(1) L. R. 4 C. P. 704.

C. A. 1910

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

[KENNEDY L.J. The difficulty is that the defendant was induced to sign the document by fraud, and did not know that it was a guarantee, but thought that it was a mere proposal for an insurance.]

The cases in which a man can repudiate his signature to an instrument which he has signed seem originally to have been confined to cases of blindness and illiteracy, to which must perhaps be added cases where there is the equivalent of illiteracy, e.g., where the document is in a language which the signer does not understand, and its contents have been misrepresented to him. In *Howatson* v. *Webb* (1) Farwell L.J. said, referring to *Hunter* v. *Walters* (2): "I think myself that the question suggested, but not decided, by Mellish L.J. in that case will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed are not based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man: see *Thoroughgood's Case* (3) and Sheppard's Touchstone, p. 56; and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of non est factum against a person who innocently acts upon the faith of the deed being valid."

Forbearance from reading a document which he signs on the part of a person who could read the document is evidence of negligence, which estops that person, as against a person who has acted upon the faith of its being valid, from alleging that the contents of the document do not represent his intention. If a person signs a document, presented to him by another, which, he ought to know, may be intended for use with a third person, careless of what its contents may be, it is a fair inference, as between him and an innocent person who has changed his position on the faith of it, that he was willing to bind himself by the terms of it, whatever they might be. The negligence of the defendant in signing the guarantee was the efficient cause of the loss sustained by the plaintiffs, the use of the document by the person who obtained it by fraud for the purpose of defrauding

(1) [1908] 1 Ch. 1, at p. 3. (2) (1871) L. R. 7 Ch. 75.
(3) (1582) 2 Rep. 9a.

the plaintiffs being a natural consequence of that negligence. [They also cited *Swan* v. *North British Australasian Co.* (1); *Ex parte Swan* (2); *Bank of Ireland* v. *Trustees of Evans' Charities* (3); *Merchants of the Staple of England* v. *Bank of England* (4); *Carr* v. *London and North-Western Ry. Co.* (5); *Union Credit Bank* v. *Mersey Docks and Harbour Board.* (6)]

Eustace Hills, for the defendant, was not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Pickford J. in this case was quite right. He held that the finding of negligence by the jury was immaterial, and he did so after discussing the case of *Foster* v. *Mackinnon* (7), and coming to the conclusion that the doctrine there laid down as regards negligence really has reference to the particular case of a negotiable instrument, to an action on which the defence that the defendant was induced to sign the instrument by fraud and misrepresentation as to its nature is set up as against a bona fide holder for value. As I understand it, that doctrine is limited to negotiable instruments, and that was really the ground of the judgment of Pickford J. in this case. Now let me deal with the matter apart from any question of negotiable instruments. In this case the finding of the jury is that the signature of the defendant to this document was obtained by fraud. The jury were asked: "Was the defendant induced to sign the guarantee by the fraud of Rigg?" They answered that he was. They then were asked: "Did the defendant know that the document which he signed was a guarantee?" They answered in the negative. It seems to me that on those findings alone the defendant would be entitled to say in respect of this guarantee that it was not, in contemplation of law, signed by him. His signature was obtained by fraud, and it is manifest, on the evidence and the findings of the jury, that he was not intending to sign any such document. What he was intending

(1) 7 H. & N. 603; 2 H. & C. 175.
(2) (1859) 7 C. B. (N.S.) 400.
(3) (1855) 5 H. L. C. 389.
(4) (1887) 21 Q. B. D. 160.
(5) (1875) L. R. 10 C. P. 307.
(6) [1899] 2 Q. B. 205.
(7) L. R. 4 C. P. 704.

C. A. 1910

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

Vaughan Williams L.J.

to sign was some document with reference to insurance. It appears to me that under the circumstances of this case the mere fact that the jury have found that there was negligence on the part of the defendant does not raise such an estoppel as prevents the defendant from setting up the defence that he never signed the guarantee and that his signature to the document was obtained from him by fraud; that he did not know of its nature, or intend to sign a document of that description. If the document in question had been not a guarantee, but a bill of exchange, and the question had arisen what was the position of a holder for value without notice of the fraud, the matter might have been different, because the law merchant, and now the statute law, puts persons who in such circumstances take bills of exchange and such like instruments in the position that they have to prove that they gave value for the bill or other like instrument honestly, but, if they prove that, it does not matter that it was originally procured by fraud.

The only other thing which I wish to say is on the question of negligence. I do not know whether the jury understood that there could be no material negligence unless there was a duty on the defendant towards the plaintiffs. Even if they did understand that, in my opinion, in the case of this instrument, the signature to which was obtained by fraud, and which was not a negotiable instrument, Pickford J. was right in saying that the finding of negligence was immaterial. I wish to add for myself that in my judgment there is no evidence whatsoever to shew that the proximate cause of the plaintiffs' advancing money on this document was the mere signature of it by the defendant. In my opinion, the proximate cause of the plaintiffs' making the advance was that Rigg fraudulently took the document to the bank, having fraudulently altered it by adding the forged signature of an attesting witness, and but for Rigg having done those things the plaintiffs would never have advanced the money at all. Under these circumstances I think that the appeal fails and must be dismissed.

BUCKLEY L.J. I am of the same opinion. There has been so much discussion during the argument as to the plea of non est

factum, and the relevance of negligence in relation to it under the circumstances of this case, that I wish to say a few words expressing my view of the law on the subject. In an action upon a deed, the defendant may say by way of defence that it is not his deed, non est factum. If it is found to be his deed, the plaintiff gets judgment and there is an end of the case. But suppose that it is found not to be his deed, and he succeeds on non est factum, the case is not necessarily over, because the plaintiff may say, "True you have established that this is not in fact your deed; but you are estopped by your conduct from saying that it is not your deed, and I can recover against you, although it is not your deed." It is only in this latter case that the question of estoppel comes into action. Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel.

I know of only three ways in which a person can be informed of the contents of a document. It may be by the eye, or by the ear, or, in the case of a blind man, it may be by touch, as under Braille's system. In this last case touch may be treated as equivalent to sight. In the case of information as to the contents of a document by the ear, the recipient of information in that way may be deceived by his informant. I will suppose a case in which he asks a person who brings him a document what its effect is, and he is told untruly that its effect is what it is not, and then signs it. In that state of things in general the document will not be his deed. The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by

C. A. 1910

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

Buckley L.J.

them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question. *Howatson* v. *Webb* (1) was a case in which the erroneous or insufficient information was not enough for the purpose. In general, the proposition is true that, if a man, acquainting himself with the contents of a deed by ear, and being told by another what it contains, receives false information as to its contents in a material respect, that is not his deed. As regards the plea of non est factum, that is this case, for the jury have found that the defendant was induced to sign this guarantee by Rigg's fraud, not knowing that it was a guarantee; so that he was defrauded by the person who brought it to him, and did not know what it was. It seems to me that under those circumstances it was not his contract. I do not think myself that cases of this kind are to be confined to the blind and illiterate. Blindness and illiteracy constitute a state of things of which the equivalent for this purpose may under certain circumstances be predicated of persons who are neither blind nor illiterate. If a document were presented to me written in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate—blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it. It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, or is by false information deceived in a material respect as to, the contents of the document which he is asked to sign.

There remains the question whether the defendant is estopped. On that question I agree that the existence of negligence may be relevant. I do not wish to add anything to what Vaughan Williams L.J. has said on that subject. I do not think that there was in this case proof of any such negligence as would avail the plaintiffs as between themselves and the defendant. The defendant did not owe any duty to the plaintiffs,

(1) [1908] 1 Ch. 1.

and the act of the defendant was not the act which involved the plaintiffs in loss. What involved the plaintiffs in loss was the act of Rigg, a rogue, who obtained from the defendant his signature to an instrument which he never intended to sign, and, having thus defrauded the defendant, proceeded to do another act which was what caused the plaintiffs loss. He took the document thus fraudulently obtained, and pretended to the plaintiffs that it was a genuine guarantee given by the defendant. In point of fact it was not. He knew how he had procured it, and that he had forged the signature of an attesting witness. It was that act which involved the plaintiffs in loss. Upon these grounds I think that the appeal fails and should be dismissed.

KENNEDY L.J. I am of the same opinion. The matter has been already so fully dealt with upon both the points raised that I need not say very much. I entirely assent to the exposition which has been given of the law with regard to non est factum as a defence. The principle involved, as I understand it, is that a consenting mind is essential to the making of a contract, and that in such a case as this there was really no consensus, because there was no intention to make a contract of the kind in question. The argument for the plaintiffs on this point was largely based upon the judgment in the case of *Foster* v. *Mackinnon* (1), but to my mind it clearly appears from the judgment in that case itself—and I think that it is made still clearer on comparing that case with *Swan* v. *North British Australasian Co.* (2)—that that judgment must be read as specifically referring, so far as it turns on negligence, to the case of a negotiable instrument, the importance of the distinction between which and other instruments for the present purpose is insisted upon very clearly in the case of *Swan* v. *North British Australasian Co.* (2) both in the Court below and in the Exchequer Chamber. As regards the reasoning upon which I think that this appeal ought to be dismissed, I should be quite content myself to accept the judgment of Pickford J. I think that he was right on both of the points of view from which he regarded the case. In the first place I do not think that, on the facts of the case,

(1) L. R. 4 C. P. 704. (2) 7 H. & N. 603; 2 H. & C. 175.

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C. A. 1910

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

Kennedy L.J.

the so-called negligence of the defendant, which was really induced by the fraudulent action of Rigg, was negligence which can help the plaintiffs, because it was not negligence in the breach of any duty to the plaintiffs, the bank, or to any class of persons, as might have been the case if the document had been a negotiable instrument; and secondly I am of opinion that the so-called negligence which is said to raise an estoppel in favour of the plaintiffs was not truly the proximate cause of the damage in respect of which the plaintiffs are suing: it was at the most an act or an omission (in whichever way you like to look at it) on the part of the defendant which was induced by fraud, and which would have produced no effect at all, had it not been for the independent and subsequent act of the fraudulent person Rigg in taking this document, making it perfect by the forgery of the signature of an attesting witness, and handing the document to the plaintiffs, with a representation that it came from the defendant and had been duly signed by him. Looking at the case, therefore, from either of the points of view taken by the learned judge below, I think that it was rightly decided by him, and therefore this appeal should be dismissed.

Application dismissed.

Solicitors for plaintiffs: *Tatham & Procter, for Broatch & Son, Keswick.*

Solicitors for defendant: *Indermaur & Brown, for Hayton, Simpson & Fisher, Cockermouth.*

E. L.

RANSON *v.* PLATT.

[1910 *Dec.* 17]

Bailment— Warehouseman — Negligence — Claim by Third Party to Goods bailed—Duty of Bailee—Notice of Claim to Bailor—Order by Magistrate that Goods be delivered to Third Party—Effect of—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *s.* 40.

The plaintiff, a married woman living apart from her husband, deposited certain goods belonging to her with the defendant, a warehouseman, the charge to be made by the defendant for the storage of the goods having been agreed upon between the plaintiff and the defendant. The plaintiff gave her address to the defendant. The plaintiff's husband subsequently went to the defendant's premises and claimed to be the owner of the goods, and, upon the defendant refusing to deliver them to him except under a magistrate's order, the husband and a representative of the defendant attended before a magistrate. The defendant's representative informed the magistrate that the goods had been deposited with the defendant by the plaintiff and that therefore the defendant for his protection required an order of the magistrate that he should deliver the goods to the husband. Thereupon a summons was issued by the magistrate under s. 40 of the Metropolitan Police Courts Act, 1839, against the defendant. The defendant did not give notice to the plaintiff that the husband claimed the goods. At the hearing of the summons the husband deposed that he was the owner of the goods and that they were worth 10*l.*, and the magistrate thereupon made an order that the defendant should deliver the goods to the husband. The defendant accordingly delivered the goods to the husband. The plaintiff subsequently brought an action in the county court claiming from the defendant the return of the goods or their value and damages for their detention, and the county court judge directed the jury that the defendant would be responsible for the loss of the goods if he by his negligence allowed the magistrate's order to be made without giving notice to the plaintiff, whose address he knew, of her husband's claim to the goods or asking the magistrate to summon the plaintiff before him so that she might be heard. The jury found that there was negligence on the part of the defendant, and the county court judge thereupon gave judgment for the plaintiff. On appeal to the Divisional Court:—

Held by Phillimore and Bucknill JJ. (Darling J. doubting), that there was no duty on the defendant to do more than bring before the notice of the magistrate the fact that the goods had been deposited with him by the plaintiff, and that as he had done this there was no evidence of negligence on his part, and that judgment must therefore be entered for the defendant.

Appeal by the defendant from a judgment of the judge of the Brompton County Court.

1910

RANSON v. PLATT.

The material facts were as follows. The plaintiff was a married woman, living apart from her husband. On March 30, 1910, the defendant Platt, who was a warehouseman, removed at the plaintiff's request certain goods belonging to her from a house, 4, Applegarth Road, West Kensington, and warehoused them at his premises for storage. The charges to be paid by the plaintiff for the removal and storage of the goods were agreed between her and the defendant. The plaintiff gave 132, Blythe Road, West Kensington, as her future address to the defendant's men who removed the goods.

On April 8, 1910, a man (who proved to be the plaintiff's husband) called at the defendant's premises and told the defendant's manager that the goods which the plaintiff had warehoused belonged to him and had been removed from 4, Applegarth Road by the plaintiff without his knowledge. He further said that he wanted them back to make a home for his children. The defendant's manager replied that he could not give up the goods without the plaintiff's authority, and advised the husband to go and discuss the matter with her, at the same time giving him the address 132, Blythe Road as that at which the plaintiff could be found. On April 9, 1910, the husband again went to the defendant's premises and told the defendant's manager he had been to 132, Blythe Road, but that he was there informed that his wife was not known, and that he had not been able to find her. He added that he had been to the police court and that the magistrate had told him to go to the defendant and demand the goods. The defendant's manager replied that he could not give up the goods without a magistrate's order, whereupon the husband remarked that the magistrate had said that if the defendant did not give up the goods a summons would be issued. The defendant's manager thereupon instructed his assistant manager, one Cameron, to accompany the husband to the police court. Accordingly the husband and Cameron went to the West London Police Court, and in reply to a question by the magistrate the husband swore that the defendant refused to give up the goods without an order. In answer to questions put to him by the magistrate as to why the defendant so refused, Cameron replied that the goods had

been warehoused in the plaintiff's name and that therefore the defendant could not give up the goods without her consent, and that the defendant wanted an order for his protection. A summons was accordingly issued from the police court under s. 40 of the Metropolitan Police Courts Act, 1839, by which the defendant was called upon to shew cause why an order should not be made upon him to deliver the goods to the husband, and on April 13, the return day, Cameron, by the defendant's order, attended at the police court. The defendant instructed Cameron to obey any order made by the magistrate, and that, if the magistrate held that the goods belonged to the husband, he (Cameron) must give them up to him. Before the magistrate the husband swore that he had been to 132, Blythe Road, and that the plaintiff was not known there, and that he was the owner of the goods (except a few articles which he did not claim), which were worth 10*l.* Cameron told the magistrate that the defendant would give up the goods claimed by the husband if the magistrate was satisfied as to his title to them. The magistrate thereupon adjudged the goods to be of the value of 10*l.* and made an order for their delivery by the defendant to the husband upon payment of the defendant's charges. Cameron left the police court with the husband, and the husband then told Cameron that he wanted to remove the goods, but that he had no money to pay the defendant's charges. He asked Cameron to buy some of the goods to cover the defendant's charges and provide a little money in hand. After some demur Cameron agreed, and upon behalf of the defendant bought certain of the goods for 4*l.* 11*s.*, and delivered the remainder to an address given by the husband.

On April 14, 1910, the defendant wrote to the plaintiff saying that the goods had been removed by order of the magistrate. The plaintiff called at the defendant's premises on the same day, when the defendant's manager told her where the goods had been taken to, and that he had acted on a magistrate's order. He also told her that he still had some goods which the husband had not claimed and asked her for her address if she would like to have them sent there. She said she would wait for the present, and he then suggested that she should go to the

1910

RANSON v. PLATT.

magistrate. Accordingly on April 15 the plaintiff went to the police court, but the magistrate told her he could do nothing further, that her remedy was against her husband, and that it appeared that perjury had been committed.

The plaintiff then commenced the action in the county court. By her particulars of claim the plaintiff claimed (inter alia) the return and delivery up of the goods which she alleged the defendant had wrongfully detained and neglected to return after demand made for their delivery, or their value, and damages for their detention.

The trial took place with a jury, and the county court judge in summing up to the jury said that he must hold that an order properly obtained under s. 40 of the Metropolitan Police Courts Act, 1839, would protect the defendant as to the goods handed over to the plaintiff's husband, but that he thought that the defendant would be responsible for the loss of those goods to the plaintiff if he by his negligence allowed the order to be made without giving notice to the plaintiff, whose address he knew, or asking the magistrate to summon the plaintiff before him so that she might be heard.

The following are the questions which the county court judge then left to the jury and their answers thereto :—

1. Was the magistrate's order obtained by negligence on the part of the defendant? Answer: Yes.

2. If so, what damages do you assess for the loss of the goods handed over by him, and what damages for the loss of the use of those goods? Answer: 25*l.*

3. What value do you put on the goods purchased by defendant from Ranson, the husband? Answer: 10*l.*

4. What value on those which were never claimed by Ranson? Answer: 15*l.*

5. What damages for the detention of No. 2, and what for the detention of No. 3? Answer: 20*l.*

The county court judge thereupon gave judgment for the plaintiff for 70*l.* damages, to be reduced to 45*l.* upon delivery up by the defendant of the goods still in the defendant's possession.

The defendant appealed upon the grounds (inter alia)—

1. That the judge misdirected the jury in telling them that, if

the order made by the magistrate was obtained by the plaintiff's husband through negligence on the part of the defendant, the defendant was liable to the plaintiff in damages for the loss of the goods delivered up in pursuance of the order.

2. That there was no evidence of negligence on the part of the defendant.

Heber Hart, for the defendant. (1) The county court judge was wrong in holding that the defendant was under any liability to the plaintiff.

First, the order of the magistrate which was made under s. 40 of the Metropolitan Police Courts Act, 1839, absolutely protected the defendant whether he was negligent or not. As the magistrate had jurisdiction to make the order, its effect was equivalent to an eviction of the defendant by title paramount: *Biddle* v. *Bond*. (2) Sect. 40 of the Act of 1839 gives the magistrate the power to order delivery of goods the value of which is not greater than 15*l*. to the person claiming to be the owner, and in the absence of fraud the defendant was absolutely protected by the order.

Secondly, there was no negligence on the part of the defendant. There was no duty on the defendant to tell the plaintiff that proceedings to recover the goods were being taken by a third party. The only duty on a warehouseman is to warehouse, i.e., to take reasonable care with regard to the custody of the goods in his possession: *Shelbury* v. *Scotsford*. (3) The duty of a warehouseman is to keep the goods in his physical custody, but he is not liable if the goods are taken from him by title paramount.

[He was stopped by the Court.]

W. R. Warren, for the plaintiff. It was the duty of the defendant to keep the goods against all third persons and to deliver them up to no one but the plaintiff. It is not contended

(1) The arguments were heard in the first instance by Darling and Bucknill JJ., but at their request Phillimore J. joined the Court, no objection being made by the parties. The case was then re-argued on behalf of the plaintiff, no further argument on behalf of the defendant being called for.

(2) (1865) 6 B. & S. 225.

(3) (1602) Yelv. 22.

1910

RANSON v. PLATT.

that the defendant ought to have kept them as against the bailiff of the police court after the order was made, but he ought to have at least given notice to the plaintiff, the bailor, of the adverse claim which was being made by her husband: *Wilson* v. *Anderton*. (1) It is the duty of a bailee to deliver up to the bailor the goods bailed whenever requested by the bailor so to do. The defendant knew that the plaintiff was to be found at 132, Blythe Road. A person could not with any sense of security warehouse goods if their safety is liable to be imperilled by the warehouseman being at liberty without notice to the bailor to hand them over to a third person who demands them. A bailee must act with regard to the goods bailed with him with the same degree of diligence as he would use if the goods belonged to himself. He must protect the interests of the bailor as far as he can. The defendant is to blame for the loss of the goods because immediately the title of the plaintiff was challenged and the summons was applied for by the husband the defendant ought to have given notice to the plaintiff.

The defendant is not protected by the magistrate's order. The order was made because the husband swore that the goods were his, but the fact that the husband so swore does not afford any protection to the defendant.

DARLING J. In this case, before Phillimore J. came to our assistance, my brother Bucknill was of opinion that this appeal should be allowed. I was not, nor am I now, entirely of that opinion, but I shall not differ from the judgment which they will pronounce, although I am not altogether convinced that it was not the duty of the defendant, the warehouseman, to do something more than he actually did. I think it is the duty of a warehouseman to do a great deal in order to protect the goods of the bailor, and I am inclined to think that in the present case the defendant ought to have given notice to the plaintiff of the attack which had been made on her title to the goods. He did give notice to the magistrate, when the summons was applied for, that the goods had been deposited in the plaintiff's name, and that was no doubt something towards protecting her title to the

(1) (1830) 1 B. & Ad. 450.

goods, but, as I have said, I am not satisfied that he did all that he should have done.

PHILLIMORE J. I do not find that there was any duty on the part of the defendant to do more than bring to the notice of the tribunal before which the matter came that there was a claimant other than the husband to these goods. That was effectually done by the defendant, but, unfortunately, the magistrate allowed himself to be deceived by the false statements which were made by the plaintiff's husband. So far, however, as the warehouseman or bailee was concerned I do not think that he was under any duty to do more than he did. For this reason I think that this appeal should be allowed and judgment entered for the defendant.

BUCKNILL J. I agree that this appeal should be allowed for the reasons stated by Phillimore J.

Appeal allowed.

Solicitors for plaintiff: *Oswald Hanson & Smith.*
Solicitor for defendant: *L. W. Taylor.*

J. E. A.

1910

Dec. 16, 17.

UPFILL *v.* WRIGHT.

Landlord and Tenant—Lease—House let to kept Woman—Immoral Purpose—Right to recover Rent.

The plaintiff by his agent let a flat to the defendant for a term of three years. The agent knew that the defendant was the mistress of a certain man, and he assumed that the rent would come through her being a kept woman and would come from the man whose mistress she was; and he knew that the man went constantly to the flat to visit her. After the expiration of the term the defendant continued as tenant from year to year. In an action to recover the rent:—

Held, that as the flat was let for an immoral purpose the plaintiff was not entitled to recover.

Appeal from the Clerkenwell County Court.

The action was brought to recover 72*l.* 10*s.*, being a half-year's rent of a flat in Southampton Row, London, in the following circumstances:—By an agreement in writing, dated July 4, 1901, the plaintiff, through his agent, who managed the property for him, agreed to let the flat to the defendant, who was a spinster, for the term of three years from June 24, 1901, at the yearly rent of 145*l.*, payable by equal quarterly payments on the usual quarter days. The defendant agreed not to permit the premises to be used for any unlawful or immoral purpose; and there was a proviso for re-entry without any notice to quit upon breach of any of the tenant's agreements. After the expiration of the three years the defendant continued as tenant from year to year. On December 8, 1909, the agent gave the defendant notice to quit, the notice expiring on June 24, 1910. The rent for the half-year ending June 24, 1910, not having been paid, the plaintiff brought this action.

The defence, so far as material to this report, was that the flat was to the knowledge of the plaintiff's agent taken for an immoral purpose, and that therefore the plaintiff could not recover. The plaintiff's agent in his evidence stated that at the time when he let the flat to the defendant he was told that she was the mistress of a certain man, who was one of her references, and he supposed that the rent would come through her being a kept woman; that he knew that the man

constantly came to the flat, and he supposed that the man was finding the money for the rent. He further stated that he did not know that the defendant was a prostitute or was intending to use or was using the flat as a prostitute until the date when he gave her notice to quit. The defendant in her evidence stated that she told the agent that she was a prostitute and was taking the flat for the purpose of receiving men there. The county court judge accepted the evidence of the plaintiff's agent as true, and in his judgment, after saying that the contention on the part of the defendant was that, as the plaintiff's agent was aware when he let the flat that the defendant intended to receive there for an immoral purpose the man who kept her, and as he believed that the rent was in effect to be provided by him, the position was the same as if she was to his knowledge intending to use the premises for prostitution generally, said: "I have consulted the authorities, and in particular the well-known case of *Pearce* v. *Brooks* (1), where a claim against a prostitute for the hire of a brougham failed,and there is no doubt that if a man or his agent knowingly lets a house to a prostitute and he also knows that she intends to take or receive men there (not if she intends to use it merely as her residence), the rent is irrecoverable. But I am being asked to go a great deal further than any decided case, and I am not prepared to go to the length of holding that in the present case the rent is irrecoverable." He accordingly gave judgment for the plaintiff.

Dec. 16. *Clarke Hall*, for the defendant. The plaintiff's agent knew that the flat was being taken for an immoral purpose and therefore cannot recover the rent: *Pearce* v. *Brooks*. (1) It is not necessary as a defence to prove that the defendant was a prostitute and took the flat to the knowledge of the agent for the purposes of prostitution. It is sufficient if the agent knew that the defendant was an immoral woman who took the flat in order to use it for an immoral purpose. He knew that the defendant was the mistress of a certain man who was going to find the money to pay the rent, so as to be able to visit her at the flat for an immoral purpose. The claim for the rent

(1) (1866) L. R. 1 Ex. 213.

1910

UPFILL v. WRIGHT.

is affected by the taint of immorality and is not enforceable: *Smith* v. *White*. (1) No doubt both those cases related to common prostitutes, but the degree of immorality is immaterial. Further, the plaintiff's agent knew when he gave the notice to quit on December 8, 1909, that the defendant was a prostitute using the flat as such, and upon that ground he cannot recover the rent for the half-year ending June 24, 1910: *Jennings* v. *Throgmorton*. (2) The agreement contained a stipulation by the defendant not to permit the premises to be used for any immoral purpose, and there was a proviso for re-entry upon breach of any of the tenant's agreements without notice to quit. The plaintiff might have re-entered on December 8, 1909, and he cannot recover the rent accrued due since that date.

A. Powell, K.C. (*A. S. Poyser* with him), for the plaintiff. With regard to the last point, the plaintiff did all he could to make the defendant give up possession of the flat, and was obliged to give the notice to quit. He could not have recovered possession sooner if he had treated the term as forfeited and brought an action to recover possession.

With regard to the main question, all the cases cited are cases of common prostitutes. There is a great difference between letting a house to a common prostitute for the purposes of prostitution and letting a house to a woman who happens to be the mistress of a certain man. The flat was taken for the purpose of providing a home for the defendant, and the fact that the man might use it occasionally for the purpose of visiting the defendant for an immoral purpose is not sufficient to prevent the plaintiff from recovering the rent. The flat was not let for the purpose of immorality being committed there. There is no finding to that effect. The flat was let to the defendant in the ordinary way, though the plaintiff's agent knew that she was the mistress of a certain man. As was pointed out in *Crisp* v. *Churchill* (3), which is cited in *Lloyd* v. *Johnson* (4), a prostitute must have a lodging. If the defendant's contention is correct, a person who let a house before the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), to a man who had gone through the form of

(1) (1866) L. R. 1 Eq. 626.
(2) (1825) Ry. & M. 251.
(3) Unreported.
(4) (1798) 1 Bos. & P. 340.

marriage with his deceased wife's sister, for the purpose of their living there, could not recover the rent. The plaintiff, therefore, is entitled to recover.

Cur. adv. vult.

Dec. 17. DARLING J. This case raises a point which does not seem to have been exactly decided before, and therefore we thought it right to take a short time to consider it. The action is brought by the landlord of a flat which he had let to an immoral woman. The flat was let through the landlord's agent, and the county court judge has found that the agent at the time when he let the flat to the defendant knew that she was an immoral woman, being the kept mistress of a certain man, and that he knew or supposed that the rent of the flat would be paid with the money of the man who kept her. The money would be given to her as the price of her immorality. that is to say, as the price of her allowing the man to visit her in the flat and to commit fornication with her there, and she would hand over the amount of the rent to the plaintiff's agent. That was the object with which the flat was taken, and for that purpose the man was willing to find the money for the rent.

There is ample authority to the effect that if articles are sold or something is hired to a prostitute for the purpose of enabling her to carry on her prostitution, neither the price of the articles sold nor the rent of the thing hired can be recovered. The county court judge recognized that, but decided in favour of the plaintiff upon this ground: "I have consulted the authorities, and in particular the well-known case of *Pearce* v. *Brooks* (1), where a claim against a prostitute for the hire of a brougham failed, and there is no doubt that if a man or his agent knowingly lets a house to a prostitute and he also knows that she intends to take or receive men there (not if she intends to use it merely as her residence), the rent is irrecoverable. But I am being asked to go a great deal further than any decided case, and I am not prepared to go to the length of holding that in the present case the rent is irrecoverable." He accordingly gave judgment for the plaintiff.

(1) L. R. 1 Ex. 213.

1910

UPFILL v. WRIGHT.

Darling J.

It does not seem to me to be necessary to go through the authorities, because the law is clear and is well stated by Pollock C.B. in *Pearce* v. *Brooks* (1): "I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied . . . . Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, Ex turpi causa non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other." Applying the law so laid down to the present case one has to see whether the flat was let either for an illegal or for an immoral purpose, for if so the rent cannot be recovered. The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear. The Litany speaks of "fornication and all other deadly sin," and the Litany is contained in the Book of Common Prayer which is in use in the Church of England under the authority of an Act of Parliament. Further, fornication is immoral, so that Courts of law take cognizance of the fact that it is immoral. The statute 13 Edw. 1, st. 4, called the Statute de Circumspecte Agatis, enacts as follows: "The King to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold pleas in Court Christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance and sometime pecuniary is enjoyned, specially if a freeman be convict of

(1) L. R. 1 Ex. at pp. 217, 218.

such things . . . . In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the King's prohibition." Although the Bishop of Norwich is specially mentioned in the statute, it is stated in 2 Phillimore's Ecclesiastical Law, 2nd ed., p. 832, citing 2 Co. Inst. 487, that the Bishop of Norwich is put there only for example, for the statute extends to all the bishops within the realm. (1)

That statute was passed because prohibition would lie to an Ecclesiastical Court which claimed to exercise jurisdiction in matters which did not belong to it, but of which the King's Courts took cognizance, and it commanded the King's justices to allow the bishop in his Ecclesiastical Court to punish the offender, and not to punish the bishop for punishing the offender. There is also the Ecclesiastical Suits Act, 1787 (27 Geo. 3, c. 44), which provides in s. 2 that "no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence . . . . after the expiration of eight calendar months from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for fornication at any time after the parties offending shall have lawfully intermarried." The reason of that enactment I believe to be this. Parliament wished to prevent the Ecclesiastical Courts from punishing for fornication a woman who had been delivered of a bastard child. In such a case the woman, being unmarried, must have committed fornication. To effect its object the Act provided that no suit should be commenced after eight calendar months from the time of the commission of the offence, nor should any prosecution be commenced or carried on after the parties had intermarried. Fornication, however, remained an offence punishable in the Ecclesiastical Courts, and it was recognized in the statutes of the realm as an offence so punishable. Fornication is therefore illegal in the sense that it is contrary to the law as recognized in various statutes, and it is immoral.

I am of opinion that this flat was let for an immoral purpose,

(1) "HILLARY. That is not a statute sealed.—WILLOUGHBY. No, the Prelates made it themselves:" Y. B. 19 Ed. III. (A.D. 1345) (ed. Pike, 1906) 292.

1910

UPFILL v. WRIGHT.

Darling J.

and the fact that the rent was to arise out of the letting made it clear that the landlord participated in the illegal or immoral act and in the immoral gains of the defendant. Therefore the case comes within the rule that out of a forbidden or immoral act no cause of action can arise. The appeal must be allowed and judgment entered for the defendant.

BUCKNILL J. This is an unusual case, the question being whether the plaintiff is entitled to recover two quarters' rent under an agreement for a lease. The county court judge held that the plaintiff was entitled to recover, and he clearly meant to base his judgment upon the fact that there was a difference between the case of a house let to a prostitute for the purpose of her prostitution and a house let to a woman who was the mistress of one man. The landlord's agent, in his evidence, which the county court judge accepted, stated that at the time when the agreement was made he knew that the defendant was a certain man's mistress; that he did not know that the defendant was a prostitute, and that until he gave notice to quit on December 8, 1909, he did not know that she was a prostitute or was using the premises as a prostitute; and that he only knew that she was that man's mistress and that the man constantly went there, and he supposed that the man, who was one of her references, was finding the money for the rent. In that state of things the question is whether this contract is affected by the taint of immorality. That is the expression which is used by Kindersley V.-C. in *Smith* v. *White* (1), and I adopt it. It seems to me to be clear that it is affected by the taint of immorality. If a woman takes a house in order to live in it as the mistress of a man and to use it for that purpose, and the landlord at the time when the lease is executed knows that it is taken for that purpose, the landlord cannot recover the rent. He could not obtain specific performance of an agreement for a lease in such a case, nor could he sue upon it, as the law will not allow a contract which is tainted with immorality to be enforced. It was urged that prostitution is one thing, and living as one man's

(1) L. R. 1 Eq. 626.

1910

UPFILL v. WRIGHT.

Bucknill J.

mistress is quite a different thing. They may differ in degree, but they both stand upon the same plane.

An argument has been addressed to us on behalf of the plaintiff which I wish to notice. It is said that our decision will cover the case of a man and a woman living together under a marriage which is void, as was the case of a man going through the form of marriage and living with his deceased wife's sister under the law as it existed before the Deceased Wife's Sister's Marriage Act, 1907, was passed. That seems to me to be wholly unlike this case. Judgment must therefore be entered for the defendant.

Appeal allowed.

Solicitors for plaintiff: *Futvoye & Baker.*

Solicitors for defendant: *Arthur Newton & Co.*

W. F. B.

CUNDIFF *v.* FITZSIMMONS.

1910

Dec. 6.

Rent-charge—Mortgage of Land subject to—Possession of Land not taken by Mortgagee—Liability of Mortgagee for Rent.

A mortgagee in fee of land which is subject to a rent-charge is personally liable to pay the rent-charge although he has never been in possession.

APPEAL from the Salford Hundred Court.

In 1870 James Pearson conveyed to T. H. Robinson a plot of land with five houses thereon situate in Park Street and Bedford Street, Ardwick, in the city of Manchester, in fee simple subject to the reservation thereout of a perpetual yearly rent-charge of 8*l.* in favour of the said James Pearson and his heirs, Robinson thereby covenanting for himself, his heirs and assigns, to pay the rent-charge. In 1873 Robinson conveyed the said land and houses to George Heaton subject to the said rent-charge. In 1884 G. Heaton mortgaged the property by way of statutory mortgage to William and David Mounsey in fee simple and covenanted with the mortgagees to duly pay the rent-charge. In 1887 William and David Mounsey transferred the mortgage to the defendants

1910

CUNDIFF v. FITZ-SIMMONS

Christine and Mary Fitzsimmons. In 1890 the rent-charge became vested in the plaintiff. In March, 1907, the mortgagor Heaton failed to pay the interest due on the mortgage, and the defendants thereupon appointed a receiver. The receiver went into possession, but the outgoings from the property, which was in a very dilapidated condition, proved to be more than the receipts. Subsequently the houses were condemned as dangerous structures and became derelict. In July, 1909, the receiver resigned his receivership. At Midsummer, 1909, the sum of 4*l.*, being half a year's rent, had become due to the plaintiff in respect of the yearly rent-charge, but was not paid, and the plaintiff accordingly brought this action against the defendants as being the owners in fee of the land out of which the rent-charge issued. The defendants had never been in possession of the property or received any rents or profits from it. The judge of the Salford Hundred Court held that the defendants, being owners in fee simple of the premises, and as such entitled at all times during the subsistence of the mortgage to take immediate possession, were liable for the rent-charge although they had never been in actual possession, and gave judgment for the plaintiff. The defendants appealed.

Hughes, *K.C.*, and *Tweedale*, for the defendants. Where land has been sold subject to a perpetual rent-charge the person who is liable to pay it is the "terre tenant," that is a person who satisfies the conditions of having a freehold interest in the land and of being in possession of the rents and profits at the time when the rent-charge accrues due. It is not disputed that a person who satisfies those conditions may now, since the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36, be sued in an action of debt for arrears of the rent-charge: *Thomas* v. *Sylvester*. (1) Nor is it disputed that if he is so in possession he will be liable beyond the amount of the profits that he may have received from the land—*Pertwee* v. *Townsend* (2)—or that he will be liable even if he has received no profits at all. Nor is it contended that the fact of there being an outstanding equity of redemption in the mortgagor makes any difference to the liability

(1) (1873) L. R. 8 Q. B. 368. (2) [1896] 2 Q. B. 129.

of the mortgagees. The contention of the defendants is that they are protected from liability by the fact that they have never been in possession. The possession of the receiver was not their possession, for under s. 24, sub-s. 2, of the Conveyancing Act, 1881, a receiver appointed by the mortgagee is to be deemed the agent of the mortgagor. In *In re Blackburn and District Benefit Building Society* (1) the society were mortgagees in possession of land subject to a rent-charge. The society was wound up and the liquidators for some time paid the rent-charge, but, finding that the annual value of the property was not equal to the rent-charge, they obtained the leave of the Court to get rid of the land, and they accordingly gave up possession. But though they entered into negotiations for the reconveyance of the land to the owner of the rent-charge, the conveyance was never executed. The owner of the rent-charge claimed to prove in the winding-up for the arrears of rent-charge accrued since the giving up of possession. It was held that the society were liable only so long as they were in possession, and that, the liquidators having renounced, the claim could not be allowed. There the fee simple remained in the society after they had given up possession, for the conveyance was never executed. The Court there went upon the ground that the action for arrears of rent-charge was an action arising out of the possession of land, and that the liquidators' "only liability was if they were in possession of the land when the rent-charge became due": per Lord Esher M.R. They evidently recognized that the mere fact of ownership of the fee did not give that possession which was necessary to support the action. That case decides that a man who has gone into possession and gone out again before accrual of the rent is not liable. A fortiori then an owner who has never been in possession at all is not liable. In *Swift* v. *Kelly* (2) the Court of Appeal in Ireland emphasized the rule that to support the action privity of estate and possession or pernancy of profits must co-exist. They accepted the basis of the judgments in the Court below "that the defendant was terre tenant, not upon the ground that he had the estate of the grantor, but that he had that estate *and* was pernor of the profits": per Palles C.B. at p. 481.

(1) (1889) 42 Ch. D. 343. (2) (1889) 24 L. R. Ir. 478.

1910

CUNDIFF v. FITZ-SIMMONS.

It is admitted that the mortgagor was not liable here, for he had no legal estate in the land. And the judgment of the Hundred Court seems to have proceeded upon the assumption that some one must be the terre tenant; that if it is not the mortgagor it must be the mortgagee. But that is a mistake. There may be no one liable, and that is the case here. There is no terre tenant, for the houses are unoccupied, and no one is in possession at all. The plaintiff's remedy is against the original covenantor if he can be found, or against the land by re-entry.

Grant, K.C., and *Hertz*, for the plaintiff. It is admitted that the terre tenant is the party liable for the rent-charge, but the defendants were the terre tenants. Terre tenancy does not imply actual possession. It is enough that there is a present freehold estate giving a right to immediate possession of the land or of the rents and profits of it. In *Brediman's Case* (1) it was agreed that in an assize of rent-charge "all the terre tenants sc. the tenants of the freehold (who always are in law intended within these words terre tenants) ought to be named." And here the defendants are the tenants of the freehold, for they, as mortgagees, are the owners of the fee. The case of *Pertwee* v. *Townsend* (2) is in the plaintiff's favour as shewing that ownership of a freehold estate in possession is enough without more to render the owner liable for the rent-charge. A mortgagee is entitled to take possession whenever he chooses to do so. The mortgagor has no legal possession, for the mortgagee may enter and turn him out at any moment. If the land is derelict, as it was here, the mortgagee is to be treated as in possession. In Littleton's Tenures, s. 233, it is said, "If a man which hath a rent seck, be once seised of any parcel of the rent, and after the tenant will not pay the rent behind, this is his remedy: he ought to go by himself or by others to the lands or tenements out of which the rent is issuing, and there demand the arrearages of the rent; and if the tenant deny to pay it this denial is a disseisin of the rent. Also if the tenant be not then ready to pay it, this is a denial, which is a disseisin of the rent. Also if the tenant nor any other man be remaining (demurrant) upon the lands or tenements to pay the rent when he demandeth the

(1) (1606) 6 Rep. 56b. (2) [1896] 2 Q. B. 129.

arrearages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an assize of novel disseisin against the tenant and shall recover the seisin of the rent and his arrearages." And at s. 238 Littleton adds that "Denial is a disseisin of a rent charge as is said before of a rent seck." Here an assize of novel disseisin would have lain against the defendants, and now since the abolition of real actions an action of debt will lie. This view of the law was accepted by Stirling J. in *In re Herbage Rents, Greenwich.* (1) The only case against the plaintiff is *In re Blackburn and District Benefit Building Society.* (2) But there the liquidators formally repudiated possession, and the Court seem to have treated them as being in the same position as if the reconveyance had been actually executed.

Hughes, K.C., in reply. In *Foley's Charity Trustees* v. *Dudley Corporation* (3), where land, on which a road was made, was presumed to have been granted to turnpike trustees subject to a perpetual rent-charge in favour of the plaintiffs, the defendants, who were the successors of the turnpike trustees, were held liable as terre tenants for the payment of the rent-charge. But there the Court went upon the ground that the defendants had possession of the roadway as far as it was possible to have it. Cozens-Hardy M.R. said "It is to my mind not open to this Court to question that road authorities in the position of the defendants have a property in and possession of the surface of the road . . . . so far in each case as is necessary for the discharge of their duties."

DARLING J. This is an appeal from a judgment of the Salford Hundred Court in an action brought by the owner of a chief rent or perpetual rent-charge against the mortgagees of the land out of which the chief rent issued to recover arrears of the rent. The mortgagees had never been in possession of the land or received any of the rents or profits of it. The judge nevertheless gave judgment for the plaintiff, and the question is whether that judgment was right. It is conceded by both parties that the person who is liable to pay the chief rent is the

(1) [1896] 2 Ch. 811. (2) 42 Ch. D. 343.
(3) [1910] 1 K. B. 317.

1910

CUNDIFF v. FITZ-SIMMONS.

Darling J.

terre tenant, that is to say the person who, having a freehold interest in the land, has the pernancy or possession of such rents and profits as there are. Mr. Hughes says that the defendants were not the terre tenants because, although they were owners in fee simple of the land, they had never entered into possession of the land and therefore were not pernors of the profits. Mr. Grant on the other hand contends that the defendants as mortgagees being entitled to take possession whenever they chose must be treated as having the possession—in other words, that right to possession and possession are for this purpose the same thing. I think Mr. Grant's contention is right, and that so long as the freeholder has an immediate right to take possession he has sufficient pernancy of the profits to render him liable for a chief rent issuing out of the land. The passage cited from Littleton's Tenures by Stirling J. in *In re Herbage Rents, Greenwich* (1) seems to cover the present case. At s. 233 it reads: "If a man which hath rent seck be once seised of any parcel of the rent, and after the tenant will not pay the rent behind, this is his remedy: he ought to go by himself or by others to the lands or tenements out of which the rent is issuing, and there demand the arrearages of the rent; and if the tenant deny to pay it, this denial is a disseisin of the rent. Also if the tenant be not then ready to pay it this is a denial which is a disseisin of the rent. Also if the tenant nor any other man be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a denial in law and a disseisin in deed, and of such disseisins he may have an assize of novel disseisin against the tenant and shall recover the seisin of the rent and his arrearages." And at s. 238. Littleton deals with the case of a rent-charge and says that denial is a disseisin of a rent-charge as well as of a rent seck. That seems to shew conclusively that the terre tenant or person who is liable to pay the rent-charge need not be in actual possession of the land and that the owner will be terre tenant even where the land is derelict. There is no doubt a passage in the judgment of Cotton L.J. in *In re Blackburn and District Benefit Building Society* (2) which at first sight seems to militate against this

(1) [1896] 2 Ch. 811. (2) 42 Ch. D. 343.

view. He says (at p. 349): "The liability of the company entirely depends upon the possession of the land, although the original purchasers may still be liable on their covenant." But I think that by the word "possession" there he meant not the actual physical possession, but the legal possession. I come then to the conclusion that the mortgagees here are the terre tenants, that they were in possession in the sense that they had the legal possession, and that the mere fact that they had not the actual occupation did not excuse them from liability to pay the chief rent. The judgment of the Court below must be affirmed.

BUCKNILL J. I agree. The question is whether the judge in the Court below was right in holding that the defendants were, by reason of their seisin as mortgagees in fee, the terre tenants of the land and therefore liable to pay the rent-charge issuing out of it. The contention of the counsel for the defendants was that, in order to render a person liable as terre tenant, he must not only have a freehold estate in the land, but also be in actual possession of it. For the plaintiff, on the other hand, it was contended that the legal possession of the freeholder is enough without actual possession or occupation. I think the plaintiff's contention is correct and that the judgment below should be affirmed. The passage cited from Littleton's Tenures shews clearly that under the old law a mortgagee of the freehold would have been a necessary party in proceedings for the recovery of arrears of rent-charge, whether he was in actual possession of the land or not, and that the mere fact of his being the owner of the freehold and entitled to take possession if he chose was sufficient to render him liable to pay the arrears. The fact that the defendants here have not chosen to take the possession which it was open to them to take cannot affect the question of their liability.

Appeal dismissed.

Solicitors for defendants: *Pearce & Sons, for Tucker & Co., Manchester.*

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Lloyd & Davies, Manchester.*

J. F. C.

1910
Dec. 14.

PHARMACEUTICAL SOCIETY *v.* NASH.

Poison—Insecticide—Sale of by Unlicensed Assistant of Licensed Shopkeeper—Liability of Assistant to Penalty—Poisons and Pharmacy Act, 1908 (8 *Edw.* 7, *c.* 55), *s.* 2.

By s. 2 of the Poisons and Pharmacy Act, 1908, "So much of the Pharmacy Act, 1868, as makes it an offence for any person to sell . . . . poisons unless he is a duly registered pharmaceutical chemist . . . . shall not apply in the case of" certain specified "poisonous substances to be used exclusively in agriculture or horticulture . . . . if the person so selling . . . . is duly licensed for the purpose" under that section:—

Held, that the words "the person so selling" include the person actually conducting the sale; and that an unlicensed shop assistant who sells on behalf of his master one of the specified poisonous substances is not protected from the liability to the penalty imposed by the Pharmacy Act, 1868, by the fact that his master is duly licensed.

Appeal from the Kingston County Court.

James Nash carried on the trade of a nurseryman and florist at 11, High Street, Wimbledon, and was licensed under the Poisons and Pharmacy Act, 1908, "thereat to sell . . . . insecticides, fumigating compounds, and weed killers, being poisonous substances to which section 2 of the Poisons and Pharmacy Act, 1908, applies, for use exclusively in connection with horticulture, subject to the provisions of the Arsenic Act, 1851, the Pharmacy Act, 1868, and the regulations made by Order in Council under the Poisons and Pharmacy Act, 1908." On March 21, 1910, a detective employed by the Pharmaceutical Society called at the said shop and purchased a half-pint bottle of a poisonous substance called "X L All Insecticide." He was served by the defendant, James Nash, junior, who acted as an assistant to his father. At the time of the purchase James Nash, senior, was not in the shop. The bottle contained 133 grains of nicotine, a poisonous vegetable alkaloid. The plaintiffs under these circumstances sued the defendant for a penalty of 5*l.* under s. 15 of the Pharmacy Act, 1868. (1) The county court judge gave judgment for the plaintiffs. The defendant appealed.

(1) By s. 15 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), "Any person who shall sell . . . . poisons . . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . . shall for every

R. O. B. Lane, for the defendant. Where a sale of a poisonous substance within s. 2 of the Act of 1908 is effected by an agent on behalf of a principal, the "person so selling" within the meaning of that section is the principal and the principal only. The defendant therefore did not sell the insecticide in question. The seller was his father, on whose behalf he conducted the sale, and his father was duly licensed. It is true that under the Pharmacy Act, 1868, it has been held that the agent as well as the principal answered the description of the person selling, and was liable to a penalty for selling a poison if he was unregistered: *Pharmaceutical Society* v. *Wheeldon*. (1) That decision was a departure from the ordinary law, and the reason necessitating that departure does not exist here. The Act of 1868 dealt with pharmaceutical chemists and druggists who dispensed and compounded poisonous drugs, operations which involved serious danger to the public if the dispenser or compounder was not duly qualified. But here there is no corresponding risk. The assistant does not weigh out or compound the poisonous substances. In accordance with the regulations of the Order in Council (2) he delivers the bottle in which it is contained to the

such offence be liable to pay a penalty or sum of 5*l*."

By the Poisons and Pharmacy Act, 1908, s. 2, sub-s. 1, "So much of the Pharmacy Act, 1868, as makes it an offence for any person to sell . . . . poisons unless he is a duly registered pharmaceutical chemist or chemist and druggist . . . . shall not apply in the case of poisonous substances to be used exclusively in agriculture or horticulture for the destruction of insects, fungi or bacteria, or as sheep dips or weed killers, which are poisonous by reason of their containing arsenic, tobacco, or the alkaloids of tobacco if the person so selling . . . . is duly licensed for the purpose under this section" and conforms to any regulations made under this section by Order in Council.

By the schedule to the Act, which by s. 1 is substituted for Sched. A to the Pharmacy Act, 1868, there are included in the articles to be deemed poisons within the meaning of that Act all poisonous vegetable alkaloids not specifically named in the schedule.

(1) (1890) 24 Q. B. D. 683.

(2) By regulation 14 of the Regulations made April 2, 1909, by Order in Council under s. 2 of the Act of 1908, "A poisonous substance shall not be sold except in an enclosed vessel or receptacle as received from the manufacturer, distinctly labelled with the name of the substance and the word 'poison,' and with the name and address of the seller, and with a notice of the special purpose for which it has been prepared."

1910

PHARMACEUTICAL SOCIETY v. NASH.

purchaser in the same condition as that in which it was received from the manufacturer. He does nothing more than the manual act of taking a sealed bottle from a shelf and handing it to the person asking for it. The master cannot always be in his shop, and if his assistants are required to be licensed as well as himself the expense would be prohibitive. Unless then he can have this manual act done by an unlicensed assistant, the benefit purporting to be conferred by the Act of 1908 will be illusory and the Act will become a dead letter. [He also referred to *Pharmaceutical Society* v. *London and Provincial Supply Association.* (1)]

Glyn Jones, for the plaintiffs. The application of the Act of 1868 was not limited to pharmaceutical chemists or to dispensers and compounders of pharmaceutical poisons.

PHILLIMORE J. The effect of the Act of 1908 is to add to the category of persons who can sell certain poisons. Under the Act of 1868, with the exception of certain persons whose cases have now disappeared, no one could sell poisons who was not properly qualified. The decisions of the Courts have established that for that purpose "sell" means personally sell. Then came the Act of 1908, which for the purpose of a certain limited class of poisons enables persons who have obtained a licence under that Act to sell although they are unqualified. And just as under the former Act a qualified person on whose behalf poisons were sold by an unqualified assistant could not shield the assistant under his qualification, so equally under the Act of 1908 a licensed person cannot shield an unlicensed assistant under his licence. The county court judge was right and the appeal must be dismissed.

HORRIDGE J. I agree. It seems to me that under the Act of 1908, under which licences to sell poisonous insecticides are granted, it was intended that the protection of the public which, according to the decision in *Pharmaceutical Society* v. *Wheeldon* (2), had been established by the Act of 1868 should be continued, and that only specific persons selected by the local authority

(1) (1880) 5 App. Cas. 857. (2) 24 Q. B. D. 683.

should have the licence. Where the local authority have selected a particular person to be licensed under the Act there is no reason why the protection of the licence should be extended so as to cover persons in the licensee's employ.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Thompson & Quarrell.*
Solicitors for defendant: *Rutter, Veitch & Bond.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1910

Nov. 16, 17; *Dec.* 3.

KITCHENHAM *v.* OWNERS OF S.S. JOHANNESBURG. LEACH *v.* OAKLEY STREET & CO.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Return to Ship—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), s. 1, *sub-s.* 1.

In the first of these cases under the Workmen's Compensation Act, 1906, a sailor, having been on shore with leave, while returning to the ship fell into the water and was drowned. The access to the ship from the quay was by a gangway which was properly lighted. There was no evidence whether he had or had not reached the gangway when he fell:—

Held, that it was not proved that the accident arose out of his employment and that the owners were not liable.

In the second case the sailor had also been on shore with leave and was returning; there was another ship lying between the quay and his own ship, and to get to the latter he had to cross a gangway between the two ships; he reached the gangway, and while crossing fell from it and was drowned:—

Held, that the accident arose in the course of his employment and that the owners were liable.

Moore v. *Manchester Liners, Ld.*, [1909] 1 K. B. 417; [1910] A. C. 498, discussed and explained.

APPEALS under the Workmen's Compensation Act, 1906.

KITCHENHAM *v.* OWNERS OF S.S. JOHANNESBURG.

In this case a sailor had gone on shore with leave, and on his return reached the quay alongside of which his ship was lying. The access to his ship was by a gangway which was properly lighted. He fell into the water between the quay and the ship

C. A. 1910

KITCHENHAM v. OWNERS OF S.S. JOHANNESBURG.

LEACH v. OAKLEY STREET & CO.

and was drowned. There was no evidence whether he had or had not reached the gangway when he fell, except that a watchman on the ship said he thought if he had reached it he must have heard him and he did not. His widow applied for compensation. The judge of the Brentford County Court held that the employers were liable. They appealed.

A. Neilson, for the appellants. The fair result of the evidence is that the sailor had not reached the gangway; in any case the burden of proof was on the applicant to shew that he had. If he had not reached the gangway the accident could no more have arisen out of his employment than any accident which might have happened to him in the street after he had started to return to the ship: *Marshall* v. *Owners of S.S. Wild Rose* (1); *Kelly* v. *Owners of S.S. Foam Queen.* (2)

E. M. Pollock, K.C., and *S. J. Duncan*, for the respondent. The case is covered by the decision of the House of Lords in *Moore* v. *Manchester Liners, Ld.* (3), which affirmed and adopted the dissenting judgment of Fletcher Moulton L.J. in the Court of Appeal. (4) It is not the same case as an accident in the street, because when he got to the quay side the sailor had reached a point where danger incidental to his employment arose.

The judgment of the Lord Chancellor in *Moore* v. *Manchester Liners, Ld.* (3) lays down broader lines of decision than those adopted by this Court in that and the previous cases and practically overrules *McDonald* v. *Owners of S.S. Banana* (5) and *Hewitt* v. *Owners of S.S. Duchess.* (6)

A. Neilson in reply.

The COURT reserved judgment until they should have heard the case of *Leach* v. *Oakley Street & Co.*

LEACH *v.* OAKLEY STREET & CO.

Nov. 17. The facts in this case were similar to those in the last case, except that there was clear evidence that the sailor had

(1) [1910] A. C. 486.
(2) (1910) 3 W. C. C. 113.
(3) [1910] A. C. 498.
(4) [1909] 1 K. B. 417, at p. 421.
(5) [1908] 2 K. B. 926.
(6) [1910] 1 K. B. 772.

reached the gangway which formed the access to his ship from a ship which lay between it and the quay, and fallen from the gangway. It was stated that the gangway turned over with him. The county court judge had found that the owners were liable.

A. Neilson, for the appellants.

C. A. Russell, K.C., and *Harold Brandon*, for the respondents.

A. Neilson in reply.

The COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) intimated an opinion that the facts of this case were not distinguishable from those in *Moore* v. *Manchester Liners, Ld.* (1), but said they would give judgment in the two cases together.

Dec. 3. COZENS-HARDY M.R. I have had the advantage of reading the judgment which Fletcher Moulton L.J. is about to deliver. *Leach* v. *Oakley Street & Co.* is really indistinguishable from *Moore* v. *Manchester Liners, Ld.* (1), as we intimated at the close of the argument, and that appeal must be dismissed with costs. *Kitchenham* v. *Owners of S.S. Johannesburg* presents greater difficulty. It is not easy to discover the principles which influenced the majority of the noble Lords who decided *Moore* v. *Manchester Liners, Ld.* (1); but I acquiesce in the interpretation put upon that decision by Fletcher Moulton L.J., and I agree that this appeal must be allowed with costs.

FLETCHER MOULTON L.J. These two cases raise in a sharp and clear way the same issues as were dealt with in this Court and in the House of Lords in the case of *Moore* v. *Manchester Liners, Ld.* (1) In that case the applicant was a fireman on board a steamer belonging to the respondents. While it was lying at Brooklyn he went on shore for the purpose of making certain necessary purchases and returned to the ship at night to sleep there, as was his duty. The vessel's deck was considerably higher than the wharf, and access was obtained by a ladder

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

C. A. 1910

KITCHENHAM v. OWNERS OF S.S. JOHANNESBURG. LEACH v. OAKLEY STREET & Co.

Fletcher Moulton L.J.

fastened to the ship. As he was mounting this ladder his foot slipped, and he fell between the ship and the wharf and was drowned. Upon the special facts of the case I came to the conclusion that he went on shore with leave, and the majority in the House of Lords took the same view of the facts in this respect. The first and by far the most important issue in that case was whether the accident occurred "in the course of" the man's employment. The view which I held was that his going ashore with leave did not create a suspension in his employment, and this was affirmed by a majority in the House of Lords. The other view was that whether or not the going on shore was a breach of the contract of service it created a suspension of the employment, and that that service only recommenced when the sailor had got on board the ship again. I consider it, therefore, to be settled that when a ship is in port and a sailor goes on shore with leave his employment is not interrupted thereby. The considerations on which this conclusion rests are dealt with at length in my judgment in the case.

The second issue was whether the accident arose "out of" his employment. In that case this issue offered no difficulty to my mind when once it was decided that the employment was continuous and was not interrupted by the visit to the shore. But although the decision of this as a separate issue presented no difficulties in that case, it is in its essence an issue depending on very different matters from those which decide whether the accident arises in the course of the employment. It is not dependent on whether the seaman is on board the vessel or not. A seaman would be perfectly entitled to occupy his hours of leisure in playing leapfrog or skylarking if he did not thereby break any rules. But an accident that occurs to him through his so doing might not be an accident arising out of his employment. Similarly if a seaman went on shore in his hours of leisure with leave and got injured in the traffic, that would not be an accident arising out of his employment. By going on shore with leave the seaman does not interrupt the course of his employment, but any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the

public, and not as one of the crew of the ship, and therefore is one which does not "arise out of his employment." But if, whether in his hours of leisure or not, it becomes necessary for him in fulfilment of his employment to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship.

In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore* v. *Manchester Liners, Ld.* (1), the accident is rightly said to arise out of his employment; but if the accident is shewn to arise from something not specifically connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shewn that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway, which I will suppose was not lighted, he fell in the water and was drowned, I think that the accident would arise out of his employment. But if all that is shewn is that it occurred during his return to the ship but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment. In my opinion the facts of the two cases which are before us for decision place them respectively on the one and on the other side of this narrow dividing line. In *Leach* v. *Oakley Street & Co.* another vessel was lying between the *Portslade*,

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

C. A. 1910

KITCHENHAM v. OWNERS OF S.S. JOHANNESBURG. LEACH v. OAKLEY STREET & CO.

Fletcher Moulton L.J.

which was the vessel on which the seaman served, and the wharf, and access to the *Portslade* was by means of a gangway placed between it and the other ship. The deceased was returning to the ship after going on shore with leave, and he had arrived at and passed on to this gangway when the accident occurred. It would seem that the gangway slipped and turned upside down. The man fell into the water and was drowned. This case is indistinguishable from *Moore* v. *Manchester Liners, Ld.* (1) The applicant is entitled to succeed, and the appeal must be dismissed with costs.

In the case of *Kitchenham* v. *Owners of S.S. Johannesburg* the access to the ship was by a gangway which led from the wharf to the ship. It was sufficiently lit by a hanging lamp on the davits and a light on the quay at the shore end, and it was provided with guide ropes. The evidence shews that the sailor on returning to the ship, after being absent with leave, came upon the wharf and walked towards the ship's gangway. It was not shewn that he ever reached that gangway, and from the evidence of the ship's watchman to the effect that he did not hear any one on the gangway I should conclude that he never did reach it. A splash was heard a little abaft the inboard end of the gangway, and there was a cry from some person unknown of "Man overboard." This is all the material evidence. In my opinion this is not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf or to the sailor having gone to the edge of the wharf for his own purposes (perhaps to look over in order to see the state of the tide) and fallen over. It is not the duty of the Court to speculate on such matters. It is for the applicant to prove that the accident arose "out of" the employment, and if the evidence is not sufficient to establish this the claim fails. I am of opinion that the evidence in this case falls short of what is necessary, and though one may think it possible, and even probable, that he was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case. I am therefore of opinion that this appeal must be allowed with costs.

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

FARWELL L.J. The county court judge has decided this case on the ground that it is indistinguishable from *Moore* v. *Manchester Liners, Ld.* (1) It becomes necessary, therefore, to consider exactly what that case did decide. The facts there were that the sailor had gone ashore—with leave as the House of Lords determined—and "in order to get on board his ship on his return had to climb up a ladder on to the deck of the ship. This was an ordinary open ladder and was attached at the top to the ship in such a way as to allow play for the rise and fall of the ship on the tide. The lower end rested on the quay." The sailor fell off this ladder and was drowned. The majority in this Court held that it was immaterial whether he had gone ashore with or without leave, for the accident happened before he got on board, and although he was very near the vessel and on his way back, the result must be the same as if the accident had happened while he was on the road or on the quay itself. In effect the Court held that the ladder was part of the quay, not part of the ship, or, to use another phrase, that the ladder was not within the sphere of the man's duties. Fletcher Moulton L.J. dissented, and the basis of his judgment is thus stated. (2) "In countless cases the Court of Appeal has had to deal with accidents happening to workmen going to their employment or coming away from it, and where the accident has arisen through the workmen using special modes of access provided by their employers to enable them to go to or come from the actual place of employment the Court has, so far as I know, never hesitated in holding that the accident arose out of and in the course of their employment." In the House of Lords the Lord Chancellor adopted Fletcher Moulton L.J.'s judgment. Lord Ashbourne says: "The mode of access to the ship was by a ladder which was not fixed and which swayed, and, in the words of the judge, was an unsafe contrivance. But it was the only mode by which deceased could fulfil his necessary duty of returning. This ladder attached to the ship was a requisite of it for the purposes of access, and practically for that purpose almost formed part of it. The deceased fell off the ladder whilst

(1) [1909] 1 K. B. 417; [1910] A. C. 498.
(2) [1909] 1 K. B. at p. 422.

C. A. 1910

KITCHENHAM v. OWNERS OF S S. JOHANNESBURG. LEACH v. OAKLEY STREET & CO.

Farwell L.J.

seeking to re-enter the ship." (1) Lord James of Hereford says: "If the deceased man was rightly away from the ship it would certainly be within his duty, and so within his employment, to return to the ship. He did so by the ladder from which he fell the only means of reaching the ship provided for him." (2) Lord Macnaghten, who dissented, puts it thus: "It was not, I think, in the course of the man's employment. The course of employment had been interrupted by the man going ashore for his own purpose, and although he was on the very point of resuming his employment he had not actually done so when the fatality occurred." (3) Lord Mersey, who also dissented, says: "If the man had slipped and hurt himself in one of the drinking saloons, or if he had stumbled over a step at the door in coming out of the saloon, even though he was coming out with the intention of rejoining his ship, I think the accident could neither be said to arise out of nor in the course of his employment. And I see no difference between such an accident and the falling from the ladder, for it cannot be contended that the ladder was any part of the ship." (4) The actual decision, therefore, in the case is merely that, on the facts of that case, the man had got back to the sphere of his employment. Then it is said that there are statements by the majority of the Lords that ought to govern our decision in this case. But dicta of noble and learned Lords, however eminent, cannot overrule cases decided by this Court; we should, of course, pay the most respectful and anxious heed to them, but we remain bound by the judgments of the Court of Appeal until they are reversed or overruled by the House. In *Moore* v. *Manchester Liners, Ld.* (5) the dicta are very inconclusive. The Lord Chancellor commences his speech by saying that "It was not contested that the accident which caused death arose out of the employment." (6) But, if so, his speech is merely academic, for I cannot see how any accident that arises out of the employment does not arise in the course of it. Many accidents occur in the course of but not out of the employment, but I am unable to think of any that could arise out of and not

(1) [1910] A. C. at p. 502.
(2) Ibid. at p. 504.
(3) Ibid. at p. 503.
(4) Ibid. at p. 506.
(5) [1910] A. C. 498.
(6) Ibid. at p. 500.

also in the course of the employment. I am not sure that I have rightly understood the Lord Chancellor; if the sentence (1) "If engaged for a month continuously day and night he is in the employment during the whole month, except, of course, during any time he quits the employment," governs the whole, then I respectfully agree and find nothing in it contrary to any reported case. If, however, he means that every accident that occurs to a man while on board ship arises both in the course of and also out of his employment, as the paragraph at the bottom of p. 500, "And so, to sum it up, I think an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing," appears to imply, then I venture to think that he would be reiterating the opinion expressed by him in the *Wild Rose Case* (2), and negatived by the decision of the House in that case, the Lord Chancellor being in that case in the minority. He says in that case: "The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have first to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident it equally arose out of his employment whether it occurred during that part of the voyage when he was actually working or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship. And if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I do think the accident arises out of the employment." As the Lord Chancellor was, of course, bound by the decision in that case I cannot suppose that this is his real meaning; he cannot have intended to rest his decision on grounds already determined to be erroneous by the House of Lords. Lord Ashbourne states that he decides the case on its

(1) [1910] A. C. at p. 500. (2) [1910] A. C. 486, 488.

C. A. 1910

KITCHENHAM v. OWNERS OF S.S. JOHANNESBURG. LEACH v. OAKLEY STREET & CO.

Farwell L.J.

own facts only, and Lord James says the same, although he adds some general statements. I confess that I am unable to discover any expression that amounts to a finding that there had been no break in the continuity of the employment; on the contrary, it appears to me that the question dealt with by the House was whether the man had returned to his employment or not. The first question in all cases of this sort is, What is the workman's employment? It may be continuous, as that of a sailor on a voyage, or a domestic servant, in either of which cases, unless and until the continuity is broken or suspended, any accident necessarily arises "in the course of the employment"; or it may be discontinuous, in which case the nature of the express employment and the incidents that are reasonably necessary or proper for the due performance thereof have to be taken into consideration. This consideration also arises when a continuous employment is temporarily discontinued either with leave or without. The employment of a miner whose duty it is to get coal is not confined to his work with the pick, but includes the reasonable and proper use of all matters incidental to the due discharge of his duty; for example, the use in a reasonable way of means of access over the employer's premises for going and returning, visiting the office for his pay, or going to a proper place on the premises to eat his dinner; he is authorized and entitled and therefore employed to do all these matters; but when he has once left the ambit of such employment, for example, by entering on the high road (unless, of course, he has been sent by his employer on some business of the employer), his employment ceases, and nothing that happens to him is "in the course of his employment": so in the case of a continuous employment which is discontinued, the same question arises as to the point where the employment ceased and where it is taken up again. The sailor who goes onshore on a spree, whether with or without leave, while away from the ship, is out for his own amusement, and is not in the employment of his master: his master may allow him to leave his work to go for a spree, but he cannot be said to employ him to go for a spree, and when the sailor returns the question arises at what point does he reach the ambit of his employment. It is immaterial whether he goes with leave or

without; it is not a question of misconduct at all; it is whether (to use the Lord Chancellor's phrase in *Low* v. *General Steam Fishing Co., Ld.* (1)) he was there in the course of duty, or in the course of returning to it.

To apply this to the case of *Kitchenham* v. *Owners of Steamship Johannesburg*, the man was not in the course of his employment when he went ashore to send a telegram to his wife; he was on his own private business: if he had reached the gangway and fallen off it he would have returned to the ambit of his employment within *Moore* v. *Manchester Liners, Ld.* (2), but he had not, and so for this purpose it is immaterial whether he was one yard or one mile from the gangway when he fell. The case is indistinguishable from *Hewitt* v. *Owners of S.S. Duchess* (3) and *Kelly* v. *Owners of S.S. Foam Queen.* (4) The county court judge has thus found as a fact, and found correctly in my opinion, that the sailor had not returned to the ambit of his employment. It follows, therefore, that the accident did not arise either in the course of or out of the employment. The appeal in this case must be allowed, and that in Leach's case dismissed.

Solicitors: *Botterell & Roche; J. J. Hands & Lindo; Lonsdale & Everidge; Holman, Birdwood & Co.*

(1) [1909] A. C. 523, at p. 532.
(2) [1909] 1 K. B. 417; [1910] A. C. 498.
(3) [1910] 1 K. B. 772.
(4) 3 W. C. C. 113.

J. R. B.

1910
Dec. 8, 20.

[RAILWAY AND CANAL COMMISSION.]

THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* THE SOUTH-EASTERN RAILWAY COMPANY, THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY, AND THE SOUTH-EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

Railway—Rates—Undue Preference and Undue Prejudice—Reasonable Facilities—Lease of Wharf at Station by Railway Company to Trader—Railway Company reserving Right to choose Route for Traffic to and from Wharf—Direction to send Through Traffic by one of two competing Lines—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.

The defendants, a railway company, who were the owners of land adjoining or near to certain of their stations, by agreements in writing let portions of the land to traders for use as coal wharves. The agreements contained a clause by which the tenant of each wharf agreed that he would order all traffic forwarded to the wharf to be consigned by the defendants' route, and, the rates being equal, that the defendants should decide by what routes the traffic consigned over their own and other railway routes should travel. Coal traffic from certain collieries in the Midlands to stations on the defendants' railway could be consigned either by the applicants' railway or by the Great Northern Company's railway, there being competition between the two companies for the traffic. The through rates by each route were the same, but the Great Northern Railway Company allowed to the defendants a larger proportion of the through rates than the applicants allowed. The defendants required the tenants of their wharves to have their coal from the collieries consigned to the wharves by the Great Northern Railway. The applicants complained that the defendants were thereby infringing the provisions of s. 2 of the Railway and Canal Traffic Act, 1854, and applied for an order that the defendants should afford due and reasonable facilities for the receiving, forwarding, and delivering of coal traffic passing between the applicants' railway and places on the defendants' railway, and that they should be restrained from giving undue and unreasonable preference to the Great Northern Railway Company, and from subjecting the applicants and their traffic to undue and unreasonable prejudice:—

Held, that the acts of the defendants were not, so far as regards the applicants, a contravention of the provisions of s. 2 of the Act, and that the applicants were therefore not entitled to the order asked for.

Application to the Railway and Canal Commission.

The applicants were the owners of a railway which formed

with the railway of the defendants a continuous line of communication for coal and other traffic between certain collieries in the Midlands on the applicants' railway and the stations on the defendants' railway. The Great Northern Railway also formed with the defendants' railway a continuous line of communication for the said traffic between the said collieries and the stations on the defendants' railway, and thus afforded a competitive route for the traffic from the collieries to stations on the defendants' railway.

The through rates for the traffic between the collieries and the stations on the defendants' railway were the same whether the traffic was sent over the applicants' railway or over the Great Northern Railway, but the Great Northern Railway Company allowed to the defendants a larger proportion of the through rates than the applicants allowed.

The defendants were the owners, at a large number of their stations, of land adjoining or near to the stations, and by agreements in writing they granted to coal merchants the right to occupy and use parts of this land as coal wharves at a certain rent, the agreements being terminable in each case by one calendar month's notice. Each of the agreements contained the following undertaking by the lessee:—"I will during the continuance of this agreement consign all traffic intended for places upon the South-Eastern and Chatham Railway by the South-Eastern and Chatham Railway route, and when the traffic is intended for stations beyond the South-Eastern and Chatham Railway shall also consign the same as far as possible by the South-Eastern and Chatham Railway route, and I will also order all traffic forwarded to the said premises to be consigned by the South-Eastern and Chatham Railway route, and the rates being equal the committee (the South-Eastern and Chatham Railway Companies' Managing Committee) shall decide by what routes the traffic consigned over their own and other railway routes shall travel." The defendants, in pursuance of the above clause, required the lessees of the wharves to order all coal from the above-mentioned collieries to be consigned to the wharves by the Great Northern Railway route. At the date of the filing of the application in this case there were 204 of these agreements containing this clause.

1910

LONDON AND NORTH WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY.

The applicants complained that the insertion by the defendants of the above-mentioned clause in the leases of the wharves, and their claim of a right to insist upon such clause being observed, amounted to a refusal to afford to the applicants due and reasonable facilities for the receiving, forwarding, and delivering of traffic between places on the defendants' railway and the applicants' railway, and a refusal to afford such facilities to traders on the defendants' railway desirous of having traffic consigned by the applicants' railway, and amounted to an undue and unreasonable preference to the Great Northern Railway Company, and subjected the applicants and their traffic to undue and unreasonable prejudice, in breach of the Railway and Canal Traffic Acts.

The applicants asked for an order that—

(1.) The defendants be restrained from refusing, and be ordered to afford, due and reasonable facilities for the receiving, forwarding, and delivering of traffic passing between the applicants' railway and places on the defendants' railway.

(2.) The defendants be restrained from giving an undue and unreasonable preference to the Great Northern Railway Company and traffic by the railway of that company, and from subjecting the applicants and their traffic to undue and unreasonable prejudice.

The defendants in their answer claimed that they were entitled for the protection of their own rights and interests to make agreements with traders for leases of their wharves containing the above clause and to refuse to enter into such agreements unless the clause was inserted therein, and to act upon it.

No evidence was called on behalf of either of the parties.

Sir C. A. Cripps, *K.C.*, and *L. Macassey* (*A. Moon* with them), for the applicants. The clause which the defendants insert in the leases to traders of wharves at their stations coupled with the fact that they have insisted upon the right to direct the lessees to consign their coal traffic to the wharves by the Great Northern Railway is an undue and unreasonable preference to the Great Northern Railway Company and subjects the applicants and their

traffic to undue and unreasonable prejudice. The applicants' route and the Great Northern Railway Company's route from the collieries to stations on the defendants' railway are competitive routes, and an agreement with a trader which shuts out one route imposes an undue and unreasonable prejudice upon the owners of that route and gives an undue and unreasonable preference to the other route. The clause in the leases therefore gives a preference to the Great Northern Railway Company, and is an undue, unreasonable, and unfair treatment of the applicants' railway, and it is therefore a breach of s. 2 of the Railway and Canal Traffic Act, 1854: *Rishton Local Board* v. *Lancashire and Yorkshire Ry. Co.* (1); *Holwell Iron Co.* v. *Midland Ry. Co.* (2) The agreement does not abridge the powers of this Court: Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 11. The clause obliges the tenant of a wharf to consign his traffic by the Great Northern route, no matter how much better or more expeditious the applicants' route may be, provided that the rates are equal. It places the tenant under duress. A trader ought to be at liberty to send his traffic by any route he pleases: *Great Western Ry. Co.* v. *Severn and Wye and Severn Bridge Ry. Co.* (3) It is admitted that canvassing for traffic is not objectionable, but canvassing leaves the trader free to consign his traffic how he pleases. It is no answer to say that the same result might have been obtained by canvassing. If, however, the canvasser told the trader that he would be obliged to give up the tenancy of his wharf if he did not send his traffic by a particular route, that would be canvassing accompanied by duress, and would be contrary to s. 2 of the Act. The allegation that the defendants are merely acting from enlightened self-interest, because the Great Northern Railway Company allow them a larger proportion of the through rates than the applicants allow, affords no defence: *Harris* v. *Cockermouth and Workington Ry. Co.* (4); *Baxendale* v. *Great Western Ry. Co.* (*Reading Case*). (5) The

(1) (1893) 8 Ry. & Ca. Tr. Cas. 74.
(2) [1909] 1 K. B. 486; [1910] 1 K. B. 296.
(3) (1886) 5 Ry. & Ca. Tr. Cas. 170, at p. 188.
(4) (1858) 3 C. B. (N.S.) 693, at pp. 712, 713.
(5) (1858) 5 C. B. (N.S.) 336, at p. 353.

1910

LONDON AND NORTH WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY.

applicants are prejudiced thereby, and "where an enactment imposes on the railway company in general terms the duty of giving similar treatment to all similar traffic, any person who is directly prejudiced by the breach of the duty ought to be held to have a right to complain": *Forwood Brothers* v. *Great Northern Ry. Co.* (1) The insertion of this clause in their leases is an abuse of the defendants' statutory powers. A railway company can only use or alienate their land, not being superfluous land, for the purposes of their Act: *Mulliner* v. *Midland Ry. Co.* (2) A railway company therefore can only let their land for a purpose incidental to their Act, and they are subject to the restrictions imposed by s. 2 of the Railway and Canal Traffic Act, 1854, in respect of their user of it. The applicants are entitled to the order asked for.

C. A. Russell, K.C., and *A. M. Bremner* (*G. M. Gathorne-Hardy* with them), for the defendants. There is no duress on the trader who takes a lease of a wharf from the defendants. A trader who desires to do so has to make up his mind whether he will enter into the agreement. If he has no preference for one route over another he will probably enter into the agreement. This is not the case of a trader applying to the Court and alleging that it is an undue and unreasonable prejudice to him to be compelled to consign his traffic by a route which is disadvantageous to him. No such case as that is before the Court. The applicants cannot set up the trader's rights. The trader must himself apply to the Court. It is not suggested that the defendants do not deal with the traffic coming from the applicants' railway in the same way as the traffic coming from the Great Northern Railway. The only objection is that before the traffic comes on to their railway the defendants have by an agreement with certain traders regulated the route over which the traffic consigned to the wharf shall pass. The defendants owe no duty to the applicants to consider their interests in canvassing for and obtaining traffic. When the traffic is upon their railway the defendants must give due and reasonable facilities for receiving, forwarding, and delivering it, without any undue or unreasonable preference

(1) (1904) 12 Ry. & Ca. Tr. Cas. 89, at p. 93.
(2) (1879) 11 Ch. D. 611.

in favour of any person or company. Subject to that they are at liberty to send all the traffic over which they have control by any route they please and to canvass for traffic to be sent by the route which suits them best: *Ayrshire and Wigtownshire Ry. Co.* v. *Glasgow and South Western Ry. Co.* (1) Therefore the defendants can send the traffic by whatever route they please, provided that the rates and facilities are the same. Sect. 2 of the Railway and Canal Traffic Act, 1854, applies as soon as the railway company begin their duties as carriers of merchandise, but it does not apply to conduct antecedent to that. The applicants seek to make the obligation of a railway company under the Act begin at an earlier period than it actually does. If the agreement had been entered into by a trader under duress, a common law Court could deal with the matter upon the application of the trader. The agreements are not in themselves in contravention of the Act. There is nothing in them which is to the prejudice of the applicants. The applicants must therefore shew that something further has been done by the defendants which is in violation of the rights of the applicants. They have only shewn that certain traffic, which might have been consigned by their route, has by direction of the traders been consigned by the Great Northern route, and that is done solely because it is the route which is most beneficial to the defendants. There is nothing in the Act to prevent a railway company from taking steps to secure that traffic shall come on to or leave their line by a route which pays them best. The company can admittedly canvass for that purpose, and a trader can promise to send or receive his goods by a particular route, the rates being the same as by the competitive route. There is no reason why the trader may not make a binding contract to that effect. In *Baxendale* v. *Great Western Ry. Co.* (*Reading Case*) (2) there was clearly an undue and unreasonable prejudice to the complainants, because the defendants proposed to charge all traders alike for the carriage of their goods, whether the goods were collected or delivered by a carrier or by the defendants, the latter collecting and delivering free of charge. Such a charge would also be a contravention of s. 90 of the

(1) (1888) 6 Ry. & Ca. Tr. Cas. 26. (2) 5 C. B. (N.S.) 336.

1910

LONDON AND NORTH-WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY.

Railways Clauses Act, 1845 (8 & 9 Vict. c. 20): *Great Western Ry. Co.* v. *Sutton*. (1) The present application is an attempt to stretch s. 2 of the Act of 1854 beyond its fair object.

Macassey in reply. The clause complained of in the leases shews that the policy of the defendants is to deprive the trader of his right to choose the route by which his traffic is to be consigned. If the trader brings his traffic by the applicants' route he breaks his agreement, and if he refuses to take a lease containing this agreement the defendants will not grant him a lease of a wharf. The applicants are thereby unduly prejudiced in respect of the traffic on their railway, and s. 2 of the Railway and Canal Traffic Act, 1854, applies: *East and West India Dock Co.* v. *Shaw, Savill, and Albion Co.* (2) The defendants are not entitled to use their land to the best advantage to themselves if that use involves an undue prejudice to the applicants in relation to traffic. A railway company cannot give an undue preference or impose an undue prejudice merely because it is for their own benefit to do so: *Bannatyne & Sons* v. *Great Southern and Western Ry. Co.* (3) The applicants really represent the public who are supplied with coal from these wharves—*Parkinson* v. *Great Western Ry. Co.* (4)—and who are prevented from obtaining their coal by the applicants' route.

Cur. adv. vult.

Dec. 20. A. T. LAWRENCE J. read the following judgment:—This is an application by the London and North Western Railway Company for an order restraining the defendants from refusing due and reasonable facilities to traffic passing from the applicants' railway to places situated on the defendants' railway, and from giving undue and unreasonable preference to the Great Northern Railway Company and to traffic passing from the railway of that company.

There are a number of collieries in the Midlands which are served both by the London and North Western and by the Great Northern Railways. The defendants have land at or near

(1) (1869) L. R. 4 H. L. 226.
(2) (1888) 39 Ch. D. 524.
(3) (1904) 12 Ry. & Ca. Tr. Cas. 105.
(4) (1871) L. R. 6 C. P. 554, at p. 560.

many of their stations, some of which they let to traders for their private use as coal wharves. The agreements of tenancy contain a clause by which the tenants of these wharves bind themselves in these terms: "I will also order all traffic forwarded to the said premises to be consigned by the South-Eastern and Chatham Railway route, and, the rates being equal, the committee shall decide by what routes the traffic consigned over their own and other railway routes shall travel." The rates from the collieries above mentioned to the defendants' stations are the same whether the coal comes over the London and North Western route or the Great Northern route, but the apportionments of these rates are more favourable to the defendants in the case of traffic coming from the Great Northern Railway. A difference has arisen between the defendants and the applicants upon the subject of the apportionment, and in consequence thereof the defendants have called upon their tenants, pursuant to the above clause in their tenancy agreements, to have their traffic forwarded via the Great Northern Railway.

The applicants contend that this conduct constitutes an infringement of s. 2 of the Railway and Canal Traffic Act, 1854. It is not suggested that there is anything in the handling of the traffic upon the defendants' railway of which complaint can be made. The complaint is founded solely upon the use which is being made of the above clause in the agreement. This, it is said, is a preference to the Great Northern Railway Company, and an undue and unreasonable prejudice or disadvantage to the London and North Western Railway Company. The applicants contend that s. 2 of the Act of 1854 prevents the defendants from letting their land with this term in the agreement and from putting such term in force. It is admitted that this point is novel, and that there is no authority directly in point, but it is said that in principle it is a violation of the statute, and that the dicta in a variety of cases, decided under widely different circumstances, support this view. The use of such dicta is always dangerous, for it may lead by gradual steps to almost any conclusion.

It was argued that the clause imported "duress" upon the trader entering into the agreement, but there was no evidence

1910

LONDON AND NORTH WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY.

A. T. Lawrence J.

placed before us from which any such inference could be drawn. It was further said that the trader was forced to use the less expeditious and less convenient route, but no evidence to this effect was adduced, and when a trader makes complaint before this Court founded on such evidence it will be time enough to consider that case. It was admitted that canvassing by railway companies for traffic by routes most advantageous to themselves was perfectly lawful, but it was said the same result may not be produced by such a clause as this, because it is to some extent permanent and prevents the trader from exercising a free option between different routes. This argument as to the option is true only if the matter be considered after the contract has been entered into. It is not true at the time of entering into the agreement. At that time the trader was free to consider the advantages of taking the land upon the terms offered or of not doing so, but reserving his freedom of action. Counsel for the applicants were unable to point to any statutory provision affecting a railway company's right to let its land upon the terms most advantageous to itself. It is not necessary to decide that it can do so on any terms it pleases under all circumstances; we have only to consider whether the facts before us constitute an infringement of s. 2. I do not think that they do.

The applicants deal in vague generalities. They say that the London and North Western Railway Company is prejudiced, that its traffic is "throttled at its source." It is "prevented from sending traffic over the defendants' railway." If this were accurate and not merely picturesque language it might establish a case, but it is not. In fact the traffic of the London and North Western Railway Company passes over the whole system of the defendants' railway as freely and upon the same terms as that of the Great Northern Railway Company; indeed as to apportionment on better terms. The only effect of the clause in question is to prevent the tenant of a particular plot of land from taking or receiving off the defendants' railway on to that plot traffic consigned via the London and North Western Railway without laying himself open to an action. This is indirectly a prejudice and a disadvantage to the London and North Western Railway Company, no doubt, but there is nothing to shew that

it is "undue" or "unreasonable." The London and North Western Railway Company may, for aught we know, be "unreasonable" in its apportionment contentions. Moreover, when the Act of 1854 is examined it does not appear to apply to the case at all. I think the section is narrower than the applicants in the present case contend. The Act by its title is concerned with the regulation of traffic "on railways and canals." The word "railway" in the Act includes every station "used for the purposes of public traffic." The scope of the Act is the conduct of the company qua carriers or conveyers of passengers or goods upon the railway over which the public have rights. I agree with the argument of the applicants that a railway company can do nothing, either physical or financial, with respect to traffic "on its railway" which shall unduly or unreasonably prejudice one person or prefer another. I agree that it cannot do so by acts or defaults done or committed before the traffic comes on to its railway, any more than it can by acts or defaults done after it comes on; but the enactment is confined to the treatment of traffic on or to come on to the railway while it is thereon. The Act does not concern itself with the destination or the fate of traffic when it leaves the railway. This agreement is concerned with land which, though it is the property of the railway company, forms at present no part of the railway over which the public have rights. The agreement impugned places the wharf in question in the possession of the trader. The defendant company and the public would alike be trespassers if they entered the wharf without the leave and licence, express or implied, of the tenant, the trader. It is a misconception to suppose that the defendants cannot bargain as to the user of that land freely and without reference to the Act of 1854. Their power to do so flows from their ownership of the land and not from any powers conferred upon them qua railway company. They are as such railway company exercising all their powers and performing all their duties equally to the London and North Western Railway Company and to the Great Northern Railway Company. It has not been suggested that the contract is ultra vires the company, or that it is illegal or contrary to public policy.

Our judgment must therefore be for the defendants.

1910

LONDON AND NORTH WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY.

THE HON. A. E. GATHORNE-HARDY. I concur in the judgment which has just been read, and have nothing to add.

SIR JAMES WOODHOUSE read the following judgment:—In this case we have to determine a new and important point, namely, whether it is a contravention of the Traffic Acts for a railway company, in a tenancy agreement made between it and certain traders, to impose and enforce a condition entitling the railway company to direct by which one of two competitive routes in connection with its railway through traffic consigned to the trader (the rates being the same) shall be carried. The facts are simple. The London and North Western Railway Company carry coal at a through rate from certain collieries in the Midlands to stations or places on the defendants' system in the south. The Great Northern Railway forms with the defendants' railway an alternative route for this traffic, and there is keen competition between the rival routes. The rates are the same by both routes, but the defendants obtain by the Great Northern route a larger proportion of the through rate than they receive in respect of the traffic by the applicants' route. The defendants own land at different places on their system and in many cases near their stations. It is, and it has long been, their practice to let portions of this land to traders for use as wharves or depots, by written agreements which are terminable at short notice. These agreements contain (inter alia) a clause obliging the trader to consign all traffic intended for places upon the defendants' railway, and also as far as possible for stations beyond their railway, by the defendants' route. The trader is also required to order all traffic forwarded to his wharf to be similarly consigned, and it is further provided that, the rates being equal, the defendants shall decide by what route the traffic consigned over their own and other railway routes shall travel. The defendants have been requiring traders, occupying wharves under these agreements, in compliance with the above-mentioned conditions, to have their coal traffic forwarded by the Great Northern Company's route. The applicants complain that this infringes their rights and constitutes a breach of s. 2 of the Railway and Canal Traffic Act, 1854, on the ground that the defendants are thereby

indirectly giving an undue and unreasonable preference to the Great Northern Railway Company and are subjecting the applicants' traffic to undue and unreasonable prejudice. The applicants' case has been argued on the basis of inferences which, it is said, we ought reasonably to deduce from the agreement. They have called no witnesses in support of their case. There is no evidence that any trader has complained. Traders are under no obligation to enter into these agreements. They are free to have their depots where they like and to have their traffic consigned by whichever route they choose, and access to the defendants' stations is given to all alike, but if the traders prefer, as many do, to have wharves on the defendants' land, it is reasonable to suppose that they balance the advantages and conveniences they thereby obtain with the disadvantages, if any, which they may think the above restriction imposes. I am unable to see why (the rates remaining the same) the defendants should not, as between the competing routes, further their own interests in the manner provided in their agreements. No evidence has been adduced which suggests any public mischief. It is not contended that the agreement is ultra vires or illegal. It has been argued that it constitutes a form of duress upon the trader; but no evidence has been given importing threats or coercion or which would induce me to conclude that the trader was not a free agent. It is also said that the effect of the agreement is to lessen the traffic which might otherwise pass by the applicants' route, and hence the prejudice and disadvantage to the applicants. But canvassing produces a similar result, and it is admitted that canvassing is permissible and cannot be complained of. Indeed all parties resort to it. In whatever way traffic is attracted from the applicants' route to the competing route it is obviously a disadvantage to the former, but whether the circumstances which give rise to it make that disadvantage undue or unreasonable, so as to constitute an infringement of s. 2 of the Act of 1854, is a question of fact in each particular case. Upon the facts of this case I fail to see how what the defendants have done gives a preference which is undue or unreasonable to the Great Northern route or is in excess of what they are entitled to do without committing a breach of

1910

LONDON AND NORTH WESTERN RAILWAY v. SOUTH-EASTERN RAILWAY

the Traffic Acts, and I think, therefore, that this application fails and must be dismissed.

Judgment for defendants.

Solicitor for applicants: *C. de J. Andrewes.*
Solicitor for defendants: *H. H. Groves.*

W. F. B.

1910
Dec. 15.

JACKSON *v.* A. G. MULLINER MOTOR BODY COMPANY, LIMITED.

Factory—Fencing of Machinery—Hoist not connected with Mechanical Power—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10.

Sect. 10 of the Factory and Workshop Act, 1901, which enacts, with respect to the fencing of machinery in a factory, that "every hoist or teagle and every fly-wheel directly connected with the steam or water or other mechanical power" must be securely fenced, applies to a hoist which is not connected with mechanical power.

CASE stated by justices of the peace in and for the county borough of Bootle.

At a petty sessions holden at Bootle an information was preferred by John Jackson (hereinafter called the appellant) against the A. G. Mulliner Motor Body Company, Limited (hereinafter called the respondent company), under s. 10 of the Factory and Workshop Act, 1901 (1), charging that the respondent company were occupiers of a certain factory within the meaning of the said Act, and that they did fail to fence a certain hoist in the said factory, and that in consequence of such neglect one John Thomas Hurley was killed.

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10:

"(1.) With respect to the fencing of machinery in a factory, the following provisions shall have effect:—

"(*a*) Every hoist or teagle and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine-house or not, and every part of any water wheel or engine worked by any such power, must be securely fenced."

Upon the hearing of the information the following facts were admitted or proved:—

The accident above referred to was caused by the hoist, which at the time of the accident was unfenced. The hoist was not directly connected with steam or water or other mechanical power, but was worked by means of a hand-windlass. The factory was a factory within the meaning of the Act. It was contended on behalf of the appellant that under s. 10 of the Factory and Workshop Act, 1901, there was a duty upon the respondent company to fence every hoist in the factory. For the respondent company it was contended that they were under no duty to fence any hoist in their factory not directly connected with steam or water or other mechanical power.

The justices were of opinion that upon the true construction of s. 10, sub-s. 1 (*a*), of the Act the phrase "directly connected with the steam or water or other mechanical power" applied in limitation and qualification, not alone of the expression "fly-wheel," but also of the words "hoist or teagle," and that under the section there was no duty upon the respondent company to fence the hoist, and they accordingly dismissed the information.

The question of law for the opinion of the Court was whether under the section there was a duty to fence a hoist not connected with steam or water or other mechanical power.

Rowlatt, for the appellant. The justices were wrong in thinking that s. 10, sub-s. 1 (*a*), of the Factory and Workshop Act, 1901, only applies to a hoist or teagle which is worked by mechanical power. The section means that every hoist or teagle, however worked, must be securely fenced. It is clear that s. 5 of the Factory and Workshop Act, 1878, applied to hoists and teagles which were not worked by mechanical power, for in that section the words "every hoist or teagle" were followed by the words "near to which any person is liable to pass or to be employed," which words were repealed by s. 6 of the Factory and Workshop Act, 1891; and the language of s. 21 of the Factory Act, 1844 (7 & 8 Vict. c. 15), also supports this view. There is no ground for thinking that the Legislature intended s. 10 of the Act of 1901 to be less stringent than the

1910

JACKSON v. A. G. MULLINER MOTOR BODY COMPANY, LIMITED.

earlier Acts with regard to the fencing of machinery, and there is therefore no reason for giving to the section any other than its plain grammatical meaning.

J. H. Layton, for the respondent company. Sect. 10 deals only with the fencing of "machinery." The word "machinery" in this connection includes only machinery worked by or connected with mechanical power. A hand-worked hoist is not within the section, and does not require to be fenced unless it has been certified under s. 79 by the Home Secretary to be dangerous. If this hoist did not happen to be in a building in which mechanical power was used for other purposes, it could not be contended that it ought to be fenced, for, according to the definition of factory in s. 149, a building in which there is no mechanical power is not a factory, but a workshop: *Willmott* v. *Paton* (1); and s. 10 applies to factories only, not to workshops. This being so, it follows that the only practicable construction of s. 10 is to read the words "directly connected with the steam or water or other mechanical power" as governing not only the words "every fly-wheel," but also "every hoist or teagle." The construction placed upon s. 21 of the Act of 1844 in *Coe* v. *Platt* (2) supports this view, and it was owing to that decision that the transposition of the language in s. 5 of the Act of 1878 was made.

Rowlatt in reply. If it were the fact, as suggested, that the Act only applies to machines connected with mechanical power, there would be no need for the numerous references to mechanical power which are to be found in the Act. A building in which no mechanical power is employed may be a factory within the Act.

RIDLEY J. This case raises a nice question as to whether a hand-worked hoist is required by s. 10 of the Factory and Workshop Act, 1901, to be fenced. The justices dismissed the information because they were of opinion that the words "directly connected with the steam or water or other mechanical power" in s. 10 qualified not only the words "every fly-wheel," but also the words "every hoist or teagle." In construing the language of s. 10 it is, I think, desirable, in order to see how that language

(1) [1902] 1 K. B. 237. (2) (1851) 6 Ex. 752; (1852) 7 Ex. 460.

came to be employed, to examine the successive Acts of Parliament dealing with this matter, though I do not think it is necessary to go back so far as the Factory Act, 1844. In s. 5 of the Factory and Workshop Act, 1878, the expression was "every hoist or teagle near to which any person is liable to pass or to be employed," but by s. 6 of the Act of 1891 the words "near to which any person is liable to pass or to be employed" were repealed, so that thenceforth s. 5 of the Act of 1878 ran "every hoist or teagle and every fly-wheel directly connected," &c., and those words are repeated verbatim in the Act of 1901. The fact that the words I have read were taken out of the Act of 1878 by s. 6 of the Act of 1891 seems to me to support the argument for the appellant, because up to that time it was not every hoist or teagle that had to be fenced, but only those near to which persons were liable to pass or to be employed; but after the passing of the Act of 1891 it would seem prima facie that every hoist and teagle must be fenced.

That seems to indicate that both in 1878 and in 1891 the Legislature intended to deal separately with hoists and teagles, which were apparently regarded as being especially dangerous and as requiring to be separated as a class, for the purpose of fencing, from the other machinery in a factory. It is true that in s. 5 of the Act of 1878 there are the words "directly connected with the steam or water or other mechanical power" as in s. 10 of the Act of 1901; but having regard to the words which originally followed the words "every hoist or teagle" in s. 5 of the Act of 1878, it is very difficult to say that the words as to mechanical power in that section could have applied to the words "every hoist or teagle," any more than they do grammatically in s. 10 of the Act of 1901. It does not appear to me to be necessary to consider whether every kind of machine worked by hand is "machinery" for the purposes of s. 10. In my opinion hoists and teagles are dealt with separately in s. 10 as a special class of thing; and when the section says that "every hoist or teagle" is to be fenced, one must construe the section grammatically as meaning what it says, that is to say that it applies to all hoists or teagles whether worked by mechanical power or by hand.

1910

JACKSON v. A. G. MULLINER MOTOR BODY COMPANY, LIMITED.

Ridley J.

The case of *Coe* v. *Platt* (1), to which we were referred, was decided under s. 21 of the Factory Act, 1844, the provisions of which are not the same as those of s. 10 of the Act of 1901, and I do not think that that case assists us in construing s. 10.

For these reasons I am of opinion that this appeal should be allowed and that the case must be remitted to the magistrates with a direction to them to convict the respondents.

PICKFORD J. I agree. The contention of the respondents is that their hoist need not be fenced because it is not worked by mechanical power. That depends entirely on the construction of s. 10 of the Act of 1901, and I doubt whether much assistance can be derived from considering the language used in the earlier Acts. I have come to the conclusion that the words " every hoist or teagle " in s. 10 are not qualified by the words " directly connected with the steam or water or other mechanical power " and that the section, therefore, applies to all hoists and teagles, including those not worked by mechanical power.

HAMILTON J. I agree.

Appeal allowed.

Solicitor for appellant : *Solicitor to the Treasury.*

Solicitors for respondents : *Tippets, for J. W. Wall, Bootle.*

(1) 6 Ex. 752 ; 7 Ex. 460.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 18.

FISHER *v.* GREAT WESTERN RAILWAY COMPANY.

Lands Clauses Acts—Arbitration—Costs—Offer by Promoters—Conditional Offer —Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.

By s. 34 of the Lands Clauses Consolidation Act, 1845, the costs of an arbitration under the Act are to be borne by the promoters of the undertaking in question unless the arbitrators award the same sum as or a less sum than shall have been offered by the promoters, in which case each party is to bear his own costs.

A company were by a private Act incorporating the Lands Clauses Consolidation Act, 1845, empowered to construct a bridge and on completion thereof to divert a public footpath which crossed the plaintiff's land. The company constructed the bridge and diverted the footpath. The plaintiff claimed that his land was injuriously affected; he gave notice that he desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845, and appointed an arbitrator. The company then sent to the plaintiff's solicitors a letter to this effect: "The company have made arrangements for the construction of a forty feet road which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. The road will be made as soon as practicable, and on the understanding that it will be made we make your client an offer of 50*l.* in settlement of his claim." This offer was refused, and the parties proceeded to arbitration, in which 50*l.* was awarded to the plaintiff as compensation.

Upon a special case stated between the parties in an action by the plaintiff against the company to recover his costs of the arbitration:—

Held (affirming the decision of Phillimore J.), that the offer contained in the above letter was not a good offer under s. 34 of the Lands Clauses Consolidation Act, 1845.

Appeal of the defendants from a decision of Phillimore J. upon a special case stated by agreement between the parties; reported [1910] 2 K. B. 252.

An action was commenced on June 19, 1909, in which the plaintiff claimed a sum of 50*l.* due under an award with interest thereon, and also the sum of 111*l.* 19*s.* 7*d.* taxed costs. The parties concurred in stating a special case, in which the following facts appeared:—

In and before the year 1907 an ancient public footpath ran from the borough of Ealing, in the county of Middlesex, through

C. A. 1910

FISHER v. GREAT WESTERN RAILWAY.

certain building land known as Drayton Park Estate to the town of Hanwell, in the same county, and afforded direct access to the borough of Ealing from the dwelling-houses on the Drayton Park Estate. This footpath crossed on the level the Northolt and West Ealing and Hanwell loop railways of the defendants.

The whole of the Drayton Park Estate formerly belonged to the plaintiff, but during the nine or ten years before 1907 he had sold several building plots and had himself built certain dwelling-houses thereon.

The defendants obtained powers under the Great Western Railway Act, 1904 (4 Edw. 7, c. cxcvii.), which incorporates the Lands Clauses Acts and other Acts, to construct a bridge forty feet wide over their Northolt and West Ealing loop railway, and from and after the completion and opening of the bridge to stop up and divert the portion of the public footpath which crossed their Northolt and West Ealing and Hanwell loop railways. They subsequently constructed the bridge over their railway at a certain distance to the north of the site of the footpath and also at a certain distance to the north of the northern boundary of the Drayton Park Estate. They thereupon stopped up the footpath and diverted it over the bridge. The footpath thus diverted led immediately into another building estate lying to the north of the Drayton Park Estate.

The plaintiff thereupon claimed that his estate and interest in the Drayton Park Estate were injuriously affected by the stopping up and diversion of the footpath. On January 17, 1908, he served upon the defendants a notice to the effect that, unless they were willing to pay the sum of 769*l.* and to enter into a written agreement for that purpose within twenty-one days after receipt of the notice, he desired to have the amount of compensation settled by arbitration in the manner provided by the Lands Clauses Consolidation Act, 1845.

The defendants neither paid nor entered into any agreement to pay the sum claimed. The parties failed to concur in the appointment of a single arbitrator. The plaintiff accordingly appointed his arbitrator. The defendants asked for and obtained extensions of the time in which to appoint their arbitrator.

On June 5, 1908, the plaintiff's solicitors received from the defendants' solicitor the following letter, dated June 4, 1908:—

"Dear Sirs,—Drayton Park Estate, Hanwell. Fisher and the Company—With reference to this matter, as your client has already been informed, the company have made arrangements for the construction of a forty feet road which will put Mr. Fisher's property in direct connection with the new bridge over the railway and, as they are advised, will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. But in order that my clients' position in the arbitration may be assured, I am instructed to give you formal notice on their behalf that the road above referred to will be made as soon as practicable, and on the understanding that such road will be made, to make your client an offer of 50*l.* in settlement of his claim . . . ."

This offer was refused. The defendants then appointed their arbitrator; the arbitrators appointed an umpire, before whom the arbitration took place.

Some time before the hearing of the arbitration the defendants constructed or procured the construction of a carriage road forty feet wide on a strip of land between the road carried over the bridge and another road called Shakespeare Road on the Drayton Park Estate. The road so constructed by the defendants gives access to the roads on the Drayton Park Estate from the road over the bridge.

On November 16, 1908, the umpire published his award, assessing at 50*l.* the compensation payable by the defendants to the plaintiff. The defendants took up the award and paid the umpire's charges. The plaintiff's costs were taxed at 111*l.* 19*s.* 7*d.* These costs he claimed under s. 34 of the Lands Clauses Consolidation Act, 1845. (1)

(1) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

C. A. 1910

FISHER v. GREAT WESTERN RAILWAY.

The defendants contended that the letter of June 4, 1908, was a good offer within that enactment, and that, as the umpire had awarded the same sum as had been offered, each party should bear his own costs.

The plaintiff contended that the letter was not a good offer within s. 34 of the Act inasmuch as it was conditional and embarrassing; and alternatively that if it was a good offer it was made too late.

The defendants tendered and subsequently paid into Court the amount due from them on the basis that the offer was a good offer and made in time.

The questions for the Court were—

(1.) Whether the defendants by the letter of June 4, 1908, made a good offer within s. 34 of the Lands Clauses Consolidation Act, 1845.

(2.) Whether the offer, if good, was made in time so as to deprive the plaintiff of his costs of the arbitration.

If the Court should be of opinion in the negative on the said questions or either of them, judgment was to be entered for the plaintiff for the sums claimed in and for the costs of the action.

Phillimore J. held that the offer was not a good offer under s. 34 of the Lands Clauses Consolidation Act, 1845, in that it was ambiguous and embarrassing, and gave judgment for the plaintiff. No judgment was given on the second point.

The defendants appealed.

Sir Alfred Cripps, K.C., and *Howard Wright* (*Rhys Williams* with them), for the defendants. The offer contained in the letter of June 4 was a good offer under s. 34 of the Lands Clauses Consolidation Act, 1845. An offer must have reference to the subject-matter of the arbitration: *Miles* v. *Great Western Railway* (1); it must not include something entirely different from that subject-matter. For that reason an offer of a single amount for compensation and costs is bad, the offer being uncertain as including other matters than the subject-matter of the arbitration: *Balls* v. *Metropolitan Board of Works*. (2) The true principle in these cases is to see whether the offer was

(1) [1896] 2 Q. B. 432. (2) (1866) L. R. 1 Q. B. 337.

made with reference to the same condition of things as that which existed when the award was ultimately made, and in the present case, when the parties came before the arbitrator, the circumstances which the defendants had said would then attach had come into being. It must be admitted that, if the road had not in fact been made at the date of the arbitration, the offer would not have been a good one. The fact, however, that the road was made in accordance with the intention expressed by the defendants at the date of the offer prevents the offer from being a conditional one; it was a clean offer, in which attention was called to the condition of things that would exist at the date of the arbitration. [They also cited *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1); *Gonty* v. *Manchester, Sheffield, and Lincolnshire Railway.* (2)]

Danckwerts, K.C., and *W. Mackenzie*, for the plaintiff, were not called upon.

LORD ALVERSTONE C.J. In my opinion the decision appealed from was right, and in giving my reasons for this view I do not intend to travel beyond the decided cases. It has been the law for many years past that an offer by the promoters, in order to be within s. 34 of the Lands Clauses Consolidation Act, 1845, must be made at a time which will enable the claimant to make up his mind before he has incurred any substantial expense whether or not he will accept it. That follows from the cases of *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1) and *Gray* v. *North Eastern Ry. Co.* (3) Of course a question may arise whether an offer is too late, but I will assume in the present case that it was in time to enable the respondent to decide whether he would accept it.

Now s. 34 obviously contemplates that the offer is to be one of nothing more than a sum of money. I am anxious to decide nothing beyond what is necessary for the decision of this case, because kindred questions have arisen in regard to offers of sums of money which have been followed by the execution of certain works, and I can conceive of the possibility of a difficulty

(1) (1872) L. R. 7 Q. B. 776. (2) [1896] 2 Q. B. 439.
(3) (1876) 1 Q. B. D. 696.

C. A. 1910

FISHER v. GREAT WESTERN RAILWAY.

Lord Alverstone C.J.

as to costs arising in such cases. Sect. 34 says "unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking," and I take these words to mean that the sum must be offered to the claimant in respect of the claim made by him. Under the circumstances, in my opinion, if promoters were to offer something besides money as a part of their offer it would not be a good statutory offer. But I do not desire to decide that point, because it seems to me that upon the present facts the case against the company may be put much higher. The letter of June 4 says "The company have made arrangements for the construction of a forty feet road which will put Mr. Fisher's property in direct connection with the new bridge over the railway and, as they are advised, will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath"; and then follows an offer of 50*l.* If this case had gone to the arbitrator to deal with the original claim of the claimant and with the question how far his property was injuriously affected, and the arbitrator had found that in respect of that injurious affection there was no more than 50*l.* due to the claimant, then an entirely different set of considerations would have arisen; but it appears from the special case, and from the statement made by Sir Alfred Cripps, that between the date of the offer of June 4 and the arbitration in October the road had been practically made. Therefore what was considered was the injurious affection of the property rebus sic stantibus; and I again desire to say (though I have not heard Mr. Danckwerts upon the point) that the right way to assess the compensation is to compare the condition of the property before the works were commenced and its condition when the works have been completed. Under these circumstances, having regard to the principle laid down in *Miles* v. *Great Western Railway* (1), the arbitration was in respect of a different subject-matter or a different state of things from that which existed at the date of the offer. When the arbitration was held the road had been made; whether that road was sufficient may or may not have been a question for the arbitrator, but with the road made he thought 50*l.* a sufficient

(1) [1896] 2 Q. B. 432.

sum for compensation. The condition of the claimant at the time the offer was made was quite different; he had then only before him either a promise to construct a forty feet road, or a statement that the company had made arrangements for a forty feet road. In my opinion the test applied by Phillimore J. shews that this offer was ambiguous and embarrassing, for it might be intended to mean either that an offer was made of 50*l.* coupled with a promise that the road should be made, or that 50*l.* was offered on the footing that the road would be made. It must be remembered that when a claimant receives an offer of this kind he ought to be in a position in which he can make up his mind whether he shall incur the expense of an arbitration and run the risk of having to pay his own costs; and in my opinion an offer of 50*l.* with a promise to make a road or on condition that a road is made places him in a difficulty in which he ought not to be placed. I do not think that this can be made a good offer by bringing in that which is an illegitimate consideration, namely, the fact that before the arbitration was held the road had been made. The view taken by Phillimore J. was right, namely, that this was an offer which did not enable the claimant to judge what his position would be when he went to arbitration, and that under the circumstances it was not a good offer under s. 34. Without deciding whether definite works can be included in an offer (though my present opinion is to the contrary), in my judgment this was not an offer the non-acceptance of which should deprive the claimant of his costs, and this appeal should be dismissed.

BUCKLEY L.J. In my judgment there are only two alternative constructions which can be placed upon the letter of June 4, and each is equally bad for the railway company. The first is that the railway company offered a substituted road and in addition a sum of 50*l.* The second may be paraphrased thus: "In an event which we promise you shall happen, and the happening of which is within our control, we offer you 50*l.* on the footing that that event does happen." If the true construction be the former of these, the offer is not within s. 34, as it is not an offer of a sum of money; it is an offer of a sum of money and some works.

C. A. 1910

FISHER v. GREAT WESTERN RAILWAY.

Buckley L.J.

If it be the latter, then it is not an offer of a sum certain; it is only an offer in a contingency, and that will not do.

It is sought to get over the difficulty in each of these cases by saying this. At the date when the matter came before the arbitrator for adjudication the road had been made; if the first construction be the true one, there was at that date nothing for him to determine beyond the question whether 50*l.* was a proper addition; if the second construction be the true one, the arbitrator would, the event having happened, have to take into consideration in mitigation of damage the fact that the road had been made, and would then have to say that 50*l.* was a sufficient sum. I think that in neither case is the difficulty capable of being resolved in that way. The relevant date is not the date of the adjudication by the arbitrator, but the date of the making of the offer. The object of the statute is that the claimant shall be entitled before incurring the costs of arbitration to say "I will not go on, because there has been offered to me all that I can get." He ought to be able to say, when he accepts or rejects the offer, "I am satisfied." He cannot do that if the circumstances are such that the railway company have it still in their power either to make or not to make the road. If they make the road, it is true that 50*l.* is enough; but what is to happen if they do not make it? It seems to me that at the moment when the offer is made the claimant must be in a position to say that it will or will not satisfy the pecuniary claim which he has against the promoters. Upon neither construction of the present letter was the claimant in that position. I do not base my judgment upon the letter being ambiguous and embarrassing, for I know which construction I should adopt, if it were necessary to adopt either; it seems to me that, whichever construction is selected, the offer is not within s. 34.

KENNEDY L.J. I agree that the judgment appealed from is right. It seems to me that, if the letter had stopped at the end of the first sentence with the words "closing of the old footpath," and had then gone on simply to say "we make an offer of 50*l.* in settlement of the claim," it would have been a perfectly good offer. I think that there was a great deal of sense

and of justice in Sir Alfred Cripps' contention that it is only fair to tell the claimant of a point which he may not, and, if he is not a resident, probably will not, have before his mind, namely, that when the matter comes to arbitration there will be a state of things in connection with what the promoters have done in making the new forty feet road which they will ask the arbitrator to take into consideration. A mere statement of that kind would have been creditable to the railway company, and not within the objection that it was not an offer within the Act. But unfortunately there follows a sentence which is embarrassing, and which, by the use of the words "on the understanding that such road will be made," leaves it doubtful whether (if I may use the expression) there was being thrown into the scale not merely a purse of 50*l.*, but also the completion of the road, which, if considered as an offer, the claimant might very likely have thought would lead to further litigation.

Appeal dismissed.

Solicitor for defendants: *L. B. Page.*
Solicitors for plaintiff: *F. Duke & Son.*

W. J. B.

1910
Dec. 8.

THE KING *v.* MANCHESTER CORPORATION.

Mandamus—Sufficiency of Interest of Prosecutor.

Where petitioners appear in opposition to a Bill before Parliament, and, with the object of protecting their own interests, procure the insertion in the Bill of a clause imposing a particular duty upon the promoters or other persons, they will have a sufficient interest in the performance of that duty to support an application by them for a mandamus to enforce it, notwithstanding that they are not named in the clause, and that the duty is one imposed for the benefit of the public at large.

So *held* by Lord Alverstone C.J. and Pickford J., Avory J. doubting.

Rule for a mandamus to the Corporation of Manchester to make by-laws in compliance with the provisions of a local Act.

In the year 1900 the Corporation of Manchester promoted a Bill in Parliament giving them powers to construct additional tramways in and near the city of Manchester. The Bill was opposed by the National Motor Carriage and Horse Owners Accident Insurance Union, Limited, a company which was incorporated with the objects, amongst others, of effecting insurances against damage resulting from accidents sustained by owners of all kinds of vehicles by collision, and also of procuring the amendment or repeal of legislative enactments or by-laws and regulations of local authorities which might prejudicially interfere with the convenient, proper, and free use of carts, carriages, and other vehicles. The said company desired for the protection of their own interests to have inserted in the Bill provisions as to the distances within which tramcars might lawfully follow one another upon the promoters' tramways. As the result of their opposition s. 44 was inserted in the said Bill, which became the Manchester Corporation Tramways Act, 1900 (63 & 64 Vict. c. ccxci.). By that section it was provided that the corporation should "make by-laws under the provisions of the Tramways Act, 1870, ... prescribing the distances at which carriages using the tramways shall be allowed to follow one after the other." The corporation, purporting to act under that section, made the following by-law:—"The driver of every carriage using any tramway within the city shall so drive the

same that it shall not follow a preceding carriage using the tramway at a less distance than twenty-five yards except as hereinafter mentioned viz.:—(*a*) In the central area" (which was therein defined to include certain specified streets) "the distance at which a carriage shall follow a preceding carriage shall be such as may be directed by the police." The corporation's by-law as originally drawn prescribed two yards as the minimum distance to be allowed between tramcars, but at the instance of the Board of Trade it was altered into the above form and in that form was approved by the Board. The police gave no directions as to the distance at which tramcars may follow one another in the central area, but the constables on duty in the streets regulated the traffic in the usual way. Owing to the lack of prescription of distances for tramcars the traffic in the central area became very congested, and tramcars followed one another without leaving sufficient space for vehicles to pass between them. The said insurance company were in consequence frequently obliged to pay claims upon them by their insured for damage to their horses and vehicles caused by collision in the central area. The company, having endeavoured without success to induce the corporation to amend their by-law, obtained a rule for a mandamus to the corporation to make a by-law in compliance with the terms of s. 44 of the Act of 1900.

Balfour Browne, K.C., *Lewis Coward*, K.C., and *H. Fletcher Moulton* shewed cause. The corporation have complied with the section. The by-law which the Act requires them to make is one which satisfies the Board of Trade, and the by-law in question has been approved by the Board. But even if the by-law is not a compliance with the section this is not a case for a mandamus. A similar application was made by the same prosecutors in the year 1902, and a mandamus was refused, Channell J. pointing out that the proper remedy was either to indict the corporation for breach of their statutory duty or to procure the Attorney-General to file an information. The prosecutors have not sufficient interest to entitle them to a mandamus. In *Reg.* v. *Lewisham Union* (1) the guardians had neglected the duty which

(1) [1897] 1 Q. B. 498.

1910

REX v. MANCHESTER CORPORATION.

lay upon them of enforcing the provisions of the Vaccination Acts in the district, and the district board of works as being the sanitary authority of the district sought to compel the guardians to discharge their duty. But it was held that they had no specific legal right to enforce the performance by the guardians of their duty and were not entitled to a mandamus. That is a much stronger case than the present.

Forbes Lankester, K.C., and *Bertram Jacobs*, in support of the rule. The powers of the police to regulate the traffic existed before the Act, and the object of the section was to give the public additional protection. The corporation therefore in leaving the matter to the police to deal with have neglected to perform their statutory duty. Under those circumstances a mandamus will be granted, and the present prosecutors are entitled to apply for it. In Tapping on Mandamus, p. 32, it is said, "Those for whose benefit a statute is made, although not specifically named, should be the parties, applicants for the mandamus." Here s. 44 was inserted for the benefit of the applicants, in the sense that it was inserted as the result of their opposition and was more for their benefit than for that of the rest of the public. Upon the former application before Channell and Jelf JJ. it did not appear that the Court were informed that s. 44 was inserted at the instance of the applicants, and no decision was given upon the question whether that fact would give a right to apply. A very slight special interest is enough to support an application for a mandamus. In *Reg.* v. *Cotham* (1), where licensing justices had granted a transfer of a licence in disregard of the statute giving them jurisdiction, it was held that the mere fact of the applicant being the vicar of the parish in which the licensed premises were situate was sufficient to entitle him to apply for a mandamus to the justices to hear and determine the matter of the licence according to law.

LORD ALVERSTONE C.J. A question has been raised as to whether the prosecutors have sufficient interest in the performance by the corporation of their statutory duty to entitle them

(1) [1898] 1 Q. B. 802.

to apply for a mandamus. I have more than once pointed out in this Court that we do not regard what may be called private bargains made in committee rooms; but if in fact a clause is inserted in a Bill on the petition of an opponent, which fact is of course on record, we do not consider that the opponent who has obtained that clause has no special interest in the performance of the duty imposed by the clause merely because his name does not happen to be inserted in the clause. In this case the persons for whom Mr. Lankester appears, having procured the insertion in the Bill of a special clause for the protection of the general public, and through them of their own trade interests also, are in a superior position to that of a common informer. The general question as to the amount of interest which will entitle a person to apply for a mandamus is one which may in a future case require further consideration. The authorities do not seem to be quite consistent upon the point. In *Reg.* v. *Cotham* (1) a very slight interest was held to be sufficient to allow of the application. On the other hand, the case of *Reg.* v. *Lewisham Union* (2) is an authority that where there is no direct interest and another remedy the rule ought not to be granted. The question as to the circumstances under which persons may apply for a mandamus, even though there be another remedy by indictment or by information of the Attorney-General on the relation of the prosecutor, may require to be considered. But at all events I am satisfied that the prosecutors in this case, who are only seeking to enforce a clause which was obtained on their own petition, have a sufficient interest to enable them to make the application.

Pickford J. It is said that these applicants ought not to have this mandamus because they have no greater interest than any other members of the public, and that they could have proceeded either by indictment or by putting in motion the Attorney-General. What happened, as I understand, was this: The corporation promoted this Bill, which afterwards became the Manchester Corporation Tramways Act, 1900. The applicants opposed the Bill. A clause which afterwards became s. 44 was inserted in

(1) [1898] 1 Q. B. 802. (2) [1897] 1 Q. B. 498.

1910

REX v. MANCHESTER CORPORATION.

Pickford J.

the Bill, and on the insertion of that clause the opposition to the Bill on the part of the applicants was withdrawn. They thought, rightly or wrongly, that it was desirable that greater protection should be given to themselves and the public than was afforded by the mere regulation of the tramway traffic by the police. Under those circumstances I do not think we can say that they are in the same position as every other member of the public and have no special interest in the matter. It was also said that this matter had on a previous occasion been before a Divisional Court, consisting of Channell and Jelf JJ., and that they had held that these applicants had no special interest. But it does not appear that the fact of the insertion of s. 44 in consequence of the opposition of the applicants was before the Court at all or that they considered it. Therefore I do not think that their decision is an authority which prevents us from saying that these persons have a sufficient special interest.

AVORY J. I entertain considerable doubts whether the insurance company here have that kind of personal interest which would entitle them to come and ask for this writ. I believe the true principle is that which is laid down by Wright and Bruce JJ. in *Reg.* v. *Lewisham Union.* (1) Wright J. there quoted with approval a passage from Tapping on Mandamus where it is said that "The prosecutor must be clothed with a clear legal and equitable right to something which is properly the subject of the writ, as a legal right by virtue of an Act of Parliament"; and Bruce J. said the Court "has always required that the applicant for a mandamus should have a legal specific right to enforce the performance of those duties." And Channell J., when an application was made by this very same insurance company for a similar writ in 1902, said, speaking of the present applicants, "The company and their manager, who come forward as prosecutors asking for this mandamus, are obviously, to my mind, people who have no more right than any ordinary member of the public. When a party comes to this Court with some kind of personal right, and asks to have a duty of some one else towards him ordered to be performed by mandamus,

(1) [1897] 1 Q. B. 498.

he stands in a totally different position. When a person who has no such individual right comes to the Court and asks to have a statutory or other duty performed the matter stands in a wholly different position." (1) Although it is true that that is not the ground on which the rule was there refused, that was a statement of the law which I believe to be perfectly accurate, and which seems to me to apply to the present case. In my opinion the Court is not entitled to take notice of what we are told took place in the committee room when this Bill was before the House. It does not appear to me that that confers upon the applicant the kind of legal personal right which is referred to in the judgments which I have cited. For that reason I doubt whether the applicants are persons who can properly apply for this writ.

[All the members of the Court were agreed that the corporation's by-law did not prescribe the distance at which tramcars should be allowed to follow one another, and that the corporation had consequently failed to discharge their statutory duty under s. 44 of the local Act. They accordingly made the rule for a mandamus absolute.]

Rule absolute.

Solicitors for Corporation of Manchester: *Austin & Austin, for the Town Clerk, Manchester.*

Solicitors for prosecutors: *Beale & Co., for Griffiths Lewis, Manchester.*

(1) Unreported.

J. F. C.

1910
Dec. 14.

WILLIAMS, Appellant *v.* BAKER, Respondent.

Margarine—Sale by Retail—Printed Matter on Wrapper—"Fancy or other descriptive name"—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 6—*Butter and Margarine Act*, 1907 (7 *Edw.* 7, *c.* 21), *s.* 8.

Sect. 6 of the Sale of Food and Drugs Act, 1899, which provides, in amendment of s. 6 of the Margarine Act, 1887, that no other printed matter than the word "margarine" shall appear "on" the paper wrapper in which margarine is delivered to a purchaser, is not repealed by s. 8 of the Butter and Margarine Act, 1907, which permits margarine to be described "in" a wrapper by a name combining the word "margarine" with a fancy or descriptive word approved by the Board of Agriculture and Fisheries. It is, therefore, an offence, on a sale of a kind of margarine called "Karmo" (an approved fancy or descriptive word), to deliver it to the purchaser in a paper wrapper on which are printed the words "Karmo margarine."

Case stated by a metropolitan police magistrate.

An information was preferred on May 3, 1910, by George Baker (hereinafter called the respondent), for that the appellant on April 26, 1910, at 33, Copenhagen Street, Islington, within the metropolitan police district, being a person dealing in margarine, did when selling margarine by retail (the same not being sold in a package durably branded or durably marked "margarine," as provided by the Margarine Act, 1887), omit to deliver the same to the purchaser in a paper wrapper on which no other printed matter appeared and on which was printed in capital block letters not less than half an inch long and distinctly legible the word "margarine," contrary to the provisions of the Sale of Food and Drugs Acts, 1875 to 1907. (1)

(1) Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6: "Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations:

"Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom, and sides, in printed capital letters, not less than three quarters of an inch square; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square

Upon the hearing of the information the following facts were admitted or proved:—

On April 26, 1910, the respondent asked for and purchased at the appellant's shop half a pound of "Karmo" (a kind of margarine), which was delivered to the respondent in a paper wrapper on which the words "Karmo margarine" were printed in capital block letters more than half an inch long, the word "Karmo" being above the word "margarine." The words were distinctly legible, and no other printed matter appeared on the wrapper. The respondent saw the words "Karmo margarine" on a label affixed to the larger quantity of margarine exposed for sale in the shop from which the half-pound was taken, and he also saw the words "Karmo margarine" on the wrapper when the half-pound he purchased was handed to him, and he knew that he was buying margarine.

A sample of the half-pound of "Karmo margarine" purchased by the respondent was analysed in accordance with the provisions of the Sale of Food and Drugs Acts, 1875 to 1907, and the public analyst certified that it contained 100 per cent. of margarine.

The Board of Agriculture and Fisheries, in execution of the powers conferred on them by s. 8 of the Butter and Margarine

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'margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a proper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'margarine.'"

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 6:

"(2.) The letters required to be printed on the paper wrapper in which margarine or margarine-cheese is sold shall be capital block letters not less than half an inch long and distinctly legible, and no other printed matter shall appear on the wrapper."

Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 8: "If in any wrapper enclosing margarine, or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine a person dealing in margarine describes it by any name other than either 'margarine,' or a name combining the word 'margarine' with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word 'margarine' he shall be guilty of an offence under this Act."

1910

WILLIAMS v. BAKER.

Act, 1907, approved of the name "Karmo margarine" for use in connection with margarine.

It was contended on behalf of the appellant that as the word "Karmo" was a fancy or descriptive name approved by the Board of Agriculture and Fisheries under s. 8 of the Butter and Margarine Act, 1907, he was entitled to use it in combination with the word "margarine" on the outside of the wrapper in which the margarine was sold, and that no offence had been committed.

It was contended on behalf of the respondent that s. 8 of the Butter and Margarine Act, 1907, did not affect s. 6 of the Margarine Act, 1887, as amended by s. 6 of the Sale of Food and Drugs Act, 1899, and that the word "margarine" only could be used on the wrapper.

The magistrate was of opinion that although the word "Karmo" had been approved by the Board of Agriculture and Fisheries under s. 8 of the Butter and Margarine Act, 1907, for use in connection with margarine, the appellant was not entitled to use it in combination with the word "margarine" on the wrapper in which the margarine was sold, and he convicted the appellant of the offence charged.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a right determination in point of law, and, if not, what should be done in the premises.

Bonsey, for the appellant. By s. 8 of the Margarine Act, 1887, margarine sold by retail, unless in a "package" marked with the word "margarine," was required to be delivered "in or with a paper wrapper on which shall be printed" the word "margarine." Sect. 6, sub-s. 2, of the Sale of Food and Drugs Act, 1899, increased the size of the letters to be printed on the wrapper and provided that "no other printed matter shall appear on the wrapper." The magistrate has held that the addition of the word "Karmo" on the wrapper is a contravention of s. 6, sub-s. 2, of the Act of 1899; but the word "Karmo" is a fancy or descriptive name approved by the Board of Agriculture which, under s. 8 of the Butter and Margarine Act, 1907, may be used in combination

with the word "margarine." The Acts of 1907 and 1899 are to be read together, and the combined effect of s. 6 of the Act of 1899 and s. 8 of the Act of 1907 is that it is not an offence to sell margarine in a wrapper on which are printed the words "Karmo margarine." It is true that s. 8 of the Act of 1907 uses the words "in any wrapper," whereas in s. 6 of the Act of 1899 the expression is "on the wrapper," but no point can be made of the difference between "in" and "on." The two words are obviously used in the same sense, as is shewn by the fact that s. 8 of the Act of 1907 also uses the words "in any advertisement or invoice."

Ricardo, for the respondent. The conviction was right. The language of s. 6 of the Act of 1899 is explicit and was directed to put a stop to the practice which had grown up of printing other matter, besides the word "margarine," on the wrapper: see *World's Tea Co.* v. *Gardner*. (1) Sect. 6 is not repealed by s. 8 of the Act of 1907. The word "in" was used in the latter section in order to meet cases like *Tanner* v. *Dyball* (2) and *Keeloma Dairy Co.* v. *Jones* (3), where, although the word "margarine" alone was printed on the wrapper, other printed matter was inserted in the wrapper.

[He was stopped.]

Bonsey in reply.

LORD ALVERSTONE C.J. In my opinion the magistrate came to a right decision in this case. We have to consider a system which has grown up under several Acts of Parliament. By s. 6 of the Margarine Act, 1887, certain regulations were imposed with regard to the marking of packages, parcels, and wrappers containing margarine, and it is material to observe that under that section the paper wrapper on which the word "margarine" had to be printed need not enclose the margarine, for the section said that the margarine was to be delivered to the purchaser "in or with a paper wrapper." That section was amended by s. 6 of the Sale of Food and Drugs Act, 1899, which repealed the words "or with," and altered the size of the letters

(1) (1895) 59 J. P. 358. (2) (1906) 70 J. P. 279.
(3) (1906) 70 J. P. 533.

1910

WILLIAMS v. BAKER.

Lord Alverstone C.J.

to be printed on the paper wrapper, and provided that "no other printed matter shall appear on the wrapper." That section appears to me to establish, first, that the Legislature appreciated the difference between printing on the wrapper enclosing the margarine and on a separate piece of paper to be delivered to the purchaser with the margarine; and, secondly, that it was the intention that nothing but the one word "margarine" was to appear on the wrapper. Then came s. 8 of the Butter and Margarine Act, 1907, the meaning of which is, I think, reasonably clear. The section limits the printed matter which may appear "in any wrapper" or "on any package" or "on any label attached to a parcel" or "in any advertisement or invoice." In my opinion the words "in any wrapper" were advisedly used and were intended to be contrasted with the words "on any package"; for, as appears from the two cases decided in 1906 which have been cited to us, a practice had grown up of delivering margarine to a purchaser enclosed in a paper wrapper on the outside of which was printed the word "margarine" only, so as to comply with s. 6 of the Act of 1899, and then inside the wrapper was inserted a slip or label on which other matter was printed. It was this practice which the Legislature intended to deal with when it used the words "in any wrapper" in s. 8 of the Act of 1907. The Acts of 1907 and 1899 are to be read together. Sect. 6 of the Act of 1899, which is not repealed, deals with that which may be printed on the wrapper, and s. 8 of the Act of 1907 provides that it shall be an offence if "in any wrapper" the margarine is described by any name other than "margarine" or a name combining "margarine" with a fancy or other descriptive name approved by the Board of Agriculture.

I am therefore of opinion that the magistrate rightly held that in printing the word "Karmo" on the wrapper in addition to the word "margarine" the appellant had committed an offence. The appeal must therefore be dismissed.

PICKFORD J. I agree.

AVORY J. I agree, but solely on the ground that it is the duty of the Court to construe s. 8 of the Act of 1907 as not repealing

s. 6 of the Act of 1899 if it is possible to do so. I think it is just possible, and that is all I say.

1910

WILLIAMS v. BAKER.

Appeal dismissed.

Solicitors for appellant: *Neve, Beck & Kirby.*
Solicitors for respondent: *W. T. Ricketts & Son.*

F. O. R.

DEACON *v.* EVANS.

1911 *Jan.* 13.

Shipping—Seaman—Neglect of Duty—Omission to do Act requisite for preserving Ship—Liability to Penalty—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 220.

By s. 220 of the Merchant Shipping Act, 1894, "If a master, seaman, or apprentice belonging to a British ship . . . . by neglect of duty . . . . (*b*) . . . . omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage" he shall be guilty of a misdemeanour:—

Held, that where a ship comes into collision with another vessel as the result either of the act of the master in placing the look-out man in such a position on deck that his view ahead is partially obstructed, or of the failure of the look-out man to keep a good look-out, neither the act of the master nor the neglect of the look-out man is a neglect of duty of the kind contemplated by the section.

CASE stated by the stipendiary magistrate for West Ham.

An information was laid by the appellant, an officer of the Board of Trade, under s. 220 of the Merchant Shipping Act, 1894 (1) charging that the respondent, who was the master of the British ship *Gladys*, did on July 22, 1909, by neglect of duty omit to do a lawful act proper and requisite to be done by him for preserving his ship from immediate loss, destruction, or serious damage by omitting to place a look-out man in such a position on board the ship as to be able to see at least one point on

(1) By s. 220 of the Merchant Shipping Act, 1894, "If a master, seaman, or apprentice belonging to a British ship by wilful breach of duty or by neglect of duty or by reason of drunkenness . . . .

"(*b*) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage . . . . he shall in respect of each offence be guilty of a misdemeanour."

1911

DEACON v. EVANS.

either side of the bow of the ship, with the result that a collision took place between the *Gladys*, and the British steam trawler *Prome*, whereby the *Prome* was sunk and all on board were drowned.

At the hearing the following facts were proved or admitted:— The *Gladys* was a three-masted barque of 1362 tons gross register. On July 16, 1909, she sailed from Antwerp on a passage to Frederickstadt, in Sweden. She was in ballast, the only cargo on board being a small quantity of pig iron. She was manned by a crew of fifteen hands all told, consisting of the master (the respondent), a first and second mate, and twelve seamen, who had been engaged for the run from Antwerp to Frederickstadt. The *Gladys* was during the passage about four feet down by the stern. About 9 A.M. on July 22 the *Gladys* was in the North Sea, to the southward of the Dogger Bank. She was under all plain sail, and had a number of jibs set, and was running free on a course of N.E. by E. magnetic, the wind being a strong breeze from the W.S.W., driving the vessel at a speed of eight to nine knots. The sea was smooth, the weather was fine and clear, and it was possible to see at least five miles. The respondent was in charge of the vessel and was stationed aft on the poop, walking from side to side and keeping a look-out. There was no other person on the look-out. The watch on deck consisted of the second mate and four seamen who were engaged in cleaning the decks, and an able seaman who was at the wheel which was situated on the poop. During the previous night there had been a man stationed in the forecastle keeping a look-out, but he had been withdrawn about 8 A.M., it being stated by the respondent that it was not the custom on board the *Gladys* in moderate weather with bright daylight to have a man as look-out on the forecastle head. During the previous night and the early morning of the day in question a large number of fishing vessels had been seen and passed from time to time, and between 8 A.M. and 9 A.M. a considerable number of fishing vessels forming a part of the Gamecock trawling fleet was in sight, mainly on the starboard bow of the *Gladys*. The respondent suddenly observed appearing above his vessel's bow, and distant from 100 to 120 feet, the

masthead of a trawler, which subsequently proved to be the British steam trawler *Prome*, of Hull, one of the Gamecock fleet. She had not been seen previously by the respondent or any other person on board the *Gladys*, and though the respondent stated in evidence that the state of the weather was such that he could have seen the *Prome* from four to five miles away and for at least half an hour before the collision, he was unable to give any explanation of his failure to do so. The respondent on seeing the *Prome's* masthead as aforesaid at once ordered the helm of the *Gladys* hard-a-port, but it was too late to avoid a collision, and the stem of the *Gladys* struck the *Prome*, doing the *Prome* such damage that she sank almost immediately, and all her crew, consisting of ten hands, were drowned. The respondent had a clear uninterrupted view ahead and could see at least one point either side of the bow, but could not see a vessel within half a mile ahead of the stem of the *Gladys*. There is no rule or regulation which places the master of a vessel such as the *Gladys* under an obligation to place a look-out man in such a position as mentioned in the information. The magistrate dismissed the summons subject to a case for the opinion of the Court.

Rowlatt and *Raeburn*, for the appellant. The facts shew that the respondent failed to keep a proper look-out, and the keeping of a proper look-out is obviously an "act proper and requisite to be done for preserving the ship." The failure was due either to the respondent stationing himself on the poop instead of the forecastle, where he would have had an unobstructed view, whereas standing on the poop he could not see anything straight ahead within a distance of half a mile owing to his ship being down by the stern, or else to his omitting to keep his eyes open and to see the trawler while she was still more than half a mile distant. In either case the respondent was guilty of a neglect of duty within s. 220.

Frampton, for the respondent, was not called upon.

LORD ALVERSTONE C.J. This section, which has been copied in practically identical terms from earlier Acts, is more than

1911

DEACON v. EVANS.

Lord Alverstone C.J.

fifty years old, and it is no exaggeration to say that there have been hundreds and thousands of cases in which, if the conduct of the respondent here is to be regarded as a criminal offence, prosecutions might have been maintained. Therefore when we find it suggested that the negligent conduct of a man who is purporting to discharge his duty of assisting in the navigation of a ship amounts to a criminal offence, it is of great importance to determine whether that suggestion is well founded. The negligence complained of here was either that the master did not keep a proper look-out himself so as to have seen any vessel four or five miles away for at least half an hour, or that he did not put a look-out man on the forecastle, from which position the man stationed there could have seen any vessel right up to the time of the collision; and the question is whether such negligence is the kind of neglect of duty which is struck at by s. 220. In my opinion it is not; that section was not intended to make criminally liable a person who has been negligent in the discharge of his duty, which he is carrying out or purporting to carry out, in the navigation of a ship. If it was intended to make simple negligence a criminal offence other language would have been used. The appeal must be dismissed.

HAMILTON J. It is to be observed that this section is the first of a group of sections which are headed "Provisions as to Discipline." It deals with misconduct endangering the ship, including "wilful breach of duty" and "drunkenness." It is followed by a section dealing with desertion, and a little further on in s. 225 we have a section dealing with general offences against discipline, such as quitting the ship without leave before she is placed in security, and wilful disobedience to lawful commands. Having regard to their surroundings I do not think that the words "omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage" in s. 220 were meant to include mere want of proper care in the discharge by the master or seaman of his duty. What according to the magistrate's finding the man did here was to place himself as a

ook-out man in such a position that he could have seen the trawler four or five miles away and for at least half an hour before the collision, but that either he closed his eyes or was not looking in that direction. That alone was the cause of the collision. I do not think that that would be sufficient to support a conviction.

1911

DEACON v. EVANS.

AVORY J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitor for respondent: *F. A. S. Stern.*

J. F. C.

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, CLAIMANTS *v.* UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON, RESPONDENTS.

1911
Jan. 11, 12.

Damages—Contract—Sale of Goods—Act done by Plaintiff in Mitigation of Damages—Profit accruing therefrom to the Plaintiff—Relevancy.

The W. Company, having contracted to supply certain electric machines to a railway company, delivered machines which failed to satisfy the conditions of the contract as to economy of working. The railway company accepted the machines, reserving their right to damages for the breach of contract, and subsequently, in order to avoid the expense of the continued use of the machines, bought machines of another manufacturer, P., with which they replaced those of the W. Company. If the railway company had continued to use the W. machines, the loss which they would have suffered in consequence of the breach of contract—namely, the amount by which the cost of working the machines supplied during a period of years representing the normal life of a W. machine would have exceeded the cost of working W. machines constructed in accordance with the contract for the same period—would have represented a larger sum than the price paid for the substituted P. machines:—

Held that, as the substitution of the P. machines went in mitigation of the damages consequent on the breach of contract, the railway company were entitled to recover from the W. Company the price paid for the P. machines; and none the less because the P. machines were so superior to those of the W. Company that it would have been to the

1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

pecuniary advantage of the railway company to have effected the substitution at their own cost even if the machines supplied had been in accordance with the contract.

CASE stated by an arbitrator.

1. By a contract under seal dated March 12, 1902, and made between the Metropolitan District Electric Traction Company (whose rights and liabilities at all material times had been vested in the respondents) of the one part and the claimants of the other part, it was agreed inter alia that the claimants should execute and do all things necessary to provide, deliver, and erect within the times therein mentioned, and in accordance with the specification annexed to the contract, eight steam turbines and eight turbo alternators combined, of the character, capacity, and efficiency in the contract and specification particularly specified, at the price of 250,000*l.* payable in certain instalments, the last instalment to be paid when all adjustments had been made and the machines respectively should have been operated in commercial service for sixty days to the reasonable satisfaction of the purchasers.

. . . . .

4. By the contract it was provided that every difference or dispute as to the meaning or effect of the contract and specification or in any way arising out of the same should be referred to arbitration, and by an agreement dated November 21, 1908, between the claimants and the respondents, after reciting that disputes and differences within the meaning of the contract had arisen, the parties referred the said disputes and differences to the Hon. Alfred Lyttelton as sole arbitrator.

5. In the course of the arbitration before him certain questions of law arose on which he was requested to state a case, and he accordingly stated this case for the opinion of the Court on the following points of law.

6. In pursuance of the contract and specification the claimants at various dates during the years 1904, 1905, and 1906 provided, erected, and delivered to the respondents eight steam turbines and eight turbo alternators, hereinafter referred to as "the said machines." The respondents at various dates paid to the claimants on account of the price of the said machines the sum

of 159,431*l.* 3*s.* 2*d.*, and after allowing for certain agreed reductions of the contract price and also for certain sums admitted as due from the claimants to the respondents there still remained a large sum as the unpaid balance of the contract price.

7. The said machines were defective in design and efficiency and did not comply with the provisions of the contract and specification. In particular the said machines failed to satisfy the provisions thereof with respect to economy, and their steam consumption was extravagant and materially exceeded that which the claimants guaranteed by the contract.

8. The respondents nevertheless accepted the said machines and used them for the purpose of their railway and undertaking, reserving always their right to damages in respect of the said breaches on the part of the claimants of the terms of the contract and the losses and expenses thereby occasioned to the respondents.

9. In the year 1907 the claimants, with the respondents' consent, removed one of the said machines from the premises of the respondents and thereafter for a long time by making alterations and improvements therein endeavoured to bring it into conformity with the terms and conditions of the contract and specification.

10. If their endeavours in this respect had proved successful the claimants intended to effect similar alterations and improvements in the other seven machines. The respondents, always reserving their rights as above mentioned, acquiesced in the claimants making the said experiments on the said machine.

11. After experiments and attempts extending over many months the claimants failed to bring the said machine, even as reconstructed by them, into conformity with the conditions of the contract. This appeared as the result of tests applied to the said machine in July and August, 1908. The respondents thereupon determined to replace the machines delivered by the claimants by others, and they accordingly made arrangements, which at the time of the arbitration had already been partly carried out, to substitute for the claimants' machines machines of different design and manufacture hereinafter called "Parsons machines."

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1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

13. The claim of the claimants before the arbitrator was in substance for the unpaid balance of the price of the said machines. The respondents as against this claim counter-claimed much larger sums as damages for the claimants' breaches of the contract. This counter-claim was originally put in the alternative, first, on the footing of the loss and damage already caused to the respondents and that which would in the future be caused to them by reason of the claimants' breach of contract, assuming that the respondents had continued to make use of the claimants' machines; and alternatively a much smaller sum composed of the damages already caused to the respondents, plus the cost to them of the purchase and installation of the Parsons machines.

14. The respondents at the hearing without formally abandoning the first of the above alternatives did not press it, and relied mainly on the second.

15. The damages flowing from the said breaches by the claimants of the contract appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expense of labour and of the disposal of ashes respectively caused by the defects existing in the said machines delivered by them. So far no serious controversy on the legal aspects of the case arose between the parties.

16. It was contended by the respondents that they were further entitled to recover from the claimants the cost of the purchase and installation of the Parsons machines, and that such purchase had avoided or prevented further and heavy loss and damage which must otherwise have fallen upon the claimants in respect of prospective loss and damage from extra consumption of coal and the extra cost of labour and of disposal of ashes caused by the use of their machines.

The arbitrator found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the claimants if the respondents had continued to use the claimants' defective machines in the future. He further found that the purchase of the Parsons machines was to the pecuniary advantage of the

respondents, and that the superiority of the Parsons machines in efficiency and economy over those supplied by the claimants was so great that even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the contract it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the claimants by Parsons machines so soon as the latter were to be obtained.

17. The contention of the claimants in substance was that having regard to the above facts the arbitrator was entitled to draw the inference that the "commercial life" of the claimants' machines had expired at the date of the purchase by the respondents of the Parsons machines, and that the said facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable from them by the respondents after the date when Parsons machines were procurable by the latter; and, further, that the cost of procuring and installing Parsons machines was not recoverable by the respondents from the claimants.

18. The respondents on the other hand contended that the cost of the purchase and installation of the Parsons machines was recoverable by them from the claimants as being the necessary cost and expense incurred by the respondents in mitigating or preventing (as from the respective dates when a Parsons machine was substituted for each of the claimants' machines) the damages which they would otherwise have been entitled to recover from the claimants.

The questions of law for the opinion of the Court were:—

1. Whether the contention of the claimants above set forth in paragraph 17 was well founded.

2. If not so, whether the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the claimants as part of the respondents' damages.

Sir Alfred Cripps, K.C., *Disturnal*, and *Tangye*, for the claimants. It is not disputed that the respondents are entitled

1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

to recover as damages the loss which they sustained from the claimants' breach of contract during the time that they were working the defective Westinghouse machines. But they are not entitled to recover the cost of the Parsons machines, for at the date when those machines were purchased the commercial life of the Westinghouse machines had come to an end. This necessarily follows from the finding that even if the machines supplied by the claimants had been up to contract it would still have paid the respondents to substitute Parsons machines at their own cost by reason of the overwhelming superiority of the latter as regards economy of working. The life of the Westinghouse machines was from that time as much at an end as if they had been worn out in ordinary work. They were thenceforward valueless, and a prudent board would have at once consigned them to the scrap heap. But if their life was then ended the respondents' damages for the breach of contract then came to an end also, for the damages consequent on the breach were the extra expense of working the defective machines during the period of their commercial life, and no more. If the machines had worn out the damages for the breach must have ceased. Equally must they be treated as having ceased from the time when it suited the respondents' purpose to substitute the superior machines. The recoverable damage is what the respondents have in fact lost, not what they might have lost if they had done something else. By buying the Parsons machines they improved their financial position, and the breach of contract has been no detriment to them since the time when the substitution was resolved upon. In Sedgwick on Damages, 8th ed., s. 63, it is said: "If the wrongful act of the defendant at once confers a benefit and inflicts an injury the loss actually caused will be the net result of the act to the plaintiff." If the net result is that the plaintiff's position is bettered by the breach of contract he can recover no damages at all. This was the view taken by the Privy Council in the recent case of *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1), where, the defendants having failed to carry out their contract to supply a certain quantity of gas to the plaintiffs, the plaintiffs in consequence

(1) [1911] A. C. 105.

of the breach of contract set up works and supplied themselves with gas, with the result that they made a considerable profit out of the transaction. Under those circumstances it was held that the plaintiffs could only recover nominal damages. On the same principle was the decision in *Oldershaw* v. *Holt*. (1) There a man let land to be developed for building purposes but re-entered because the tenant was not fulfilling the covenants, and he claimed damages. It was shewn that he had let the land to a new tenant on much better terms, so that the transaction of re-entry had eventuated in a profit. It was held that he was only entitled to nominal damages.

Hon. J. D. Fitzgerald, K.C., Roskill, K.C., A. B. Shaw, and *Macassey*, for the respondents. The claimants here sought to recover the contract price of their machines. The respondents counterclaimed for damages. The effect of the claimants' contention is that they are entitled to be paid the full contract price of their defective machines because there happened to be a better machine upon the market; that in consequence of the great superiority of that other machine the Court ought to treat the respondents as though the contract had been fully performed. The mere fact that the Parsons machines were better did not entitle the arbitrator to draw the inference that upon those machines being placed on the market the commercial life of the Westinghouse machines came to an end. The measure of the respondents' damages for the claimants' breach of their contract became ascertainable at the date of the breach, that is, when the machines were delivered; and at that date the proper measure of damages was the loss which the defective character of the machines would entail if used for as many years as under ordinary circumstances a Westinghouse machine would last. If, however, subsequently the respondents found that they could by a reasonable expenditure of money minimize those damages, they were bound to do so, on the terms of the claimants paying them the expenses to which they were put in effecting that reduction for their benefit. And that was what happened upon the Parsons machines being put on the market and their superior economy of working becoming known. It was then a proper

(1) (1840) 12 Ad. & E. 590.

1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

course for the respondents to buy the Parsons machines in the claimants' interest, and the claimants were bound to pay the cost. The fact that it would have been worth the respondents' while to scrap the Westinghouse machines, even if they had been according to contract, and to substitute Parsons machines for them was wholly irrelevant, for, as already stated, subject to the liability to the reduction above mentioned, the measure of the damages was fixed at the date of the breach; and at that date it could not be foreseen what would happen in the way of invention of a superior quality of machine. Parsons machines had then no existence. No inference can be drawn that after the Parsons machines were invented the respondents would have bought them if the Westinghouse machines supplied had been up to contract. Such contingencies are too remote to be entitled to consideration. The contention that no further damages were recoverable after the date of the substitution assumes that Westinghouse machines in accordance with the contract would have been of no greater value than the machines which were in fact delivered. In *Joyner* v. *Weeks* (1) it was held that the measure of damages in an action for breach of a covenant to repair demised premises was not affected by the fact that, by reason of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term, the lessor was at the time of action brought no worse off than he would have been if the defendant's covenant had been performed. That shews that the party committing a breach of contract cannot claim to reduce the damages by reference to some extraneous benefit which subsequently accrued to the plaintiff. The case of *Oldershaw* v. *Holt* (2) was a mere nisi prius direction, the propriety of which on the motion for a new trial formed no part of the decision of the Court; three out of the four judges did not even refer to it.

Sir Alfred Cripps, K.C., in reply.

LORD ALVERSTONE C.J. This case raises a question which so far as my recollection goes has not arisen before. But the principles which must govern it are so well and clearly defined

(1) [1891] 2 Q. B. 31. (2) 12 Ad. & E. 590.

that I do not think that there is any difficulty in determining the answer to it. The contract with reference to the breach of which the question arises was for the delivery of eight steam turbines and eight turbo alternators at various dates between the year 1904 and the year 1906 for the supply of electric current for the running of the underground railway. The machines were in due course delivered, but, as the arbitrator finds, they were defective in design and efficiency and did not comply with the provisions of the contract and specification, and in particular they failed to satisfy the provisions with regard to economy. The respondents took delivery of the machines and did their best to work them, and further afforded the claimants every opportunity of improving the machines and bringing them into conformity with the contract. But the endeavours of the claimants to do so did not meet with success. The case states that "After experiments extending over many months the claimants failed to bring the said machines, even as reconstructed by them, into conformity with the conditions of the contract. This appeared as the result of the tests applied to the said machine in July and August, 1908. The respondents thereupon determined to replace the machines delivered by the claimants by others, and they accordingly made arrangements, which at the time of the arbitration had already been partly carried out, to substitute for the claimants' machines machines of different design and manufacture hereinafter called 'Parsons machines.'"

Under those circumstances the question arises, What is the measure of the damages which the respondents are entitled to recover in respect of the claimants' breach of contract in supplying defective machines? When considering that question we must be careful not to confuse the measure of the damages with the obligation of the party complaining of the breach of contract to do what he can to minimize the damages. Now I have no difficulty in determining what is the prima facie measure of damages in such a case as this. You must first ascertain what would be the ordinary life of a properly constructed Westinghouse machine, that is to say the number of years during which a reasonable person would work it before finally consigning it to the scrap heap as worn out. And the measure of damages would

1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

Lord Alverstone C.J.

be the loss which the purchaser would sustain from having to work a defective Westinghouse machine during all that period instead of one which was constructed in accordance with the contract. That it seems to me would prima facie be the measure of the damages, and the sum of money which would represent that loss we are told would be a very large sum indeed. But then we have to take into consideration the other principle to which I have referred as to the duty of the complainant to do what is reasonable to minimize the loss. When a man is relying on a breach of contract for the purpose of a claim for damages he must do what he reasonably can to keep the damages down to as low a figure as possible. And here the arbitrator finds that the respondents in substituting the Parsons machines acted as they did with the object of mitigating the claim which they otherwise would have had against the claimants, and under those circumstances it is quite plain that the cost of the Parsons machines was a matter which the arbitrator ought to take into consideration. But then the arbitrator goes on to say, "I further find that the purchase of the Parsons machines was to the pecuniary advantage of the respondents, and that the superiority of the Parsons machines in efficiency and economy over those supplied by the claimants is so great that even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the contract it would have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the claimants by Parsons machines." Upon that finding Sir Alfred Cripps has contended that as soon as the superiority of the Parsons machines became known the commercial life of the claimants' machines came to an end, and that a prudent person would have ceased there and then to work them even if they had been in accordance with the contract, and that consequently from that date no further damages were recoverable. I do not think that that contention can be supported. In my opinion these questions of prudence and how far probable action in the future may be taken into consideration require to be very carefully guarded. In the landlord and tenant cases which have been referred to, where damages were claimed for breach of the covenant to repair, the

Court has refused to allow the question of what the landlord would probably do with the premises if they had been left in a proper condition of repair to be taken into consideration for the purpose of mitigating those damages. Similarly it seems to me that, for the purpose of considering the true measure of the damages in the present case, the fact that the respondents have in consequence of the breach of the vendors' contract been compelled to buy a machine which turns out to be superior to the machine contracted for is not a circumstance that can be taken into consideration in mitigation of the damages for that breach. The only purpose for which that fact can properly be taken into consideration is as bearing upon the question whether or not what the party complaining of the breach of contract did was reasonable for the purpose of mitigating the damages that would otherwise have been recoverable from the other contracting party. The finding of the arbitrator affords no ground for saying that because Parsons machines have come into use the respondents are not entitled to recover any damages beyond the time when they substituted the Parsons machines. It is clear that the railway company are entitled to recover the cost of the substituted machines on the ground that by their action they saved the claimants from a very much larger claim for damages than is in fact being made against them. I certainly do not intend it to be understood, nor did the respondents suggest, that they would have been entitled to increase the damages because it was a prudent thing in their own interests to substitute one machine for the other. If the putting in the Parsons machines had increased the damages the cost ought not to be recovered. It is because the substitution was in relief of the claimants, and for that reason alone, that the cost is recoverable.

HAMILTON J. The arbitrator has found that the machines supplied were defective in design and efficiency, and in particular that they failed to satisfy the conditions of the contract with respect to economy. There was therefore from the time of the installation a complete breach of contract, the damages for which might theoretically have been measured there and then. In connection with the measure of the damages it is important to

1911

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON.

Hamilton J

keep in mind the particular departure from the contract that is complained of. It is not that the machines would not work, or that they would not produce current enough to do the work required of them, but simply that their steam consumption was extravagant and that they did not satisfy the conditions as to economy of working. The case then finds that the respondents were compelled in consequence of the claimants' breach of contract to replace the Westinghouse machines with Parsons machines; that they so replaced them not in pursuance of an enlightened commercial policy, but only after the experiments of the claimants themselves had shewn that they could not sufficiently improve the efficiency of their machines to bring them up to the contract standard. The time which elapsed between the installation and the resolution to substitute Parsons machines for the Westinghouse was considerable, and during that time the cost of extra coal and extra labour and other extra expenses had caused heavy pecuniary loss to the buyers. But no controversy has seriously arisen as to the liability of the vendors to pay for the loss so occasioned. The only question is as to the liability to pay the cost of the Parsons machines which it was resolved to substitute. Now the arbitrator has found that the purchase of the Parsons machines was a reasonable and prudent course and that it mitigated or prevented loss or damages which would have been recoverable from the claimants if the respondents had continued to use the claimants' defective machines in the future. In ascertaining whether the course adopted was a mitigation of the damages or not he necessarily had to find what the cost to the respondents would have been of continuing to run the Westinghouse machines, and he could not have found that without first finding for how many years the Westinghouse machines could have been run, if that alternative course had been adopted. The finding that the purchase of the Parsons machines was a mitigation of the damages necessarily involved a finding as to the length of the normal life of a Westinghouse machine. That finding is a conclusion of fact, and even if the arbitrator in arriving at it made a mistake in his calculations, that is a matter with which we cannot interfere. The fact that the Parsons machine turns

out to be so greatly superior to that for which it has been substituted that it would have been worth the respondents' while in any event to effect that substitution is in my opinion a matter which is wholly irrelevant to the present inquiry. If there be any concomitant and ancillary advantages which have accrued or will accrue to the respondents from the course which they have taken, no authority has been produced to shew that the claimants who are in default are entitled to have an account taken of that. It is a transaction subsequent to the breach, a transaction inter alios, and one which appears to me to be relevant to the question of damages for the breach only in so far as it is necessary to ascertain what was the reasonable course to take in mitigation of those damages. The contention of the claimants which is set out in paragraph 17 of the case, and which is put forward as a proposition of law, that, because the Westinghouse machines were so outclassed by the Parsons that it would have paid the respondents to have got rid of them at once, even if they had been in accordance with the contract, in order to install the other machines, the commercial life of the Westinghouse machines had expired at the date of the substitution, and that consequently no further damages were recoverable, appears to me to be clearly unfounded. That contention amounts to this, that the moment it is ascertained as a matter of business prudence that the inferior machines must be superseded, the cost of the substitution of other machines which is consequent on the breach of contract cannot be legally attributed to the breach, but must be attributed entirely to the progress of science. For such a contention I can see no warrant. In my opinion the first of the two questions submitted to us by the arbitrator must be answered in the negative, and the second in the affirmative.

AVORY J. I am of the same opinion and have nothing to add.

Judgment for the respondents.

Solicitors for claimants: *Faithfull & Owen.*
Solicitors for respondents: *Bircham & Co.*

J. F. C.

1911
Jan. 17.

PARK, APPELLANT *v.* LAWTON AND ANOTHER, RESPONDENTS.

Company—List of Members—Default in sending to Registrar—No Annual General Meeting—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 26, 64.

The respondents, two directors of a company, were charged with an offence under s. 26 of the Companies (Consolidation) Act, 1908, in that they knowingly and wilfully permitted default to be made by the company in forwarding to the Registrar of Companies a copy of its list of members, with summary as to capital and shares, &c., for the year 1909, as required by s. 26, which provides that a company "shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only general meeting in the year, are members of the company," which list, containing the various particulars specified in the section, must be completed "within seven days after the fourteenth day aforesaid," and a copy thereof is to be forwarded forthwith to the Registrar.

No general meeting of the company had been held during the year 1909, and the respondents had been knowingly parties to the default of the company in that respect:—

Held, that the fact that no general meeting had been held was in the circumstances no defence to the charge of not complying with the requirements of s. 26.

Gibson v. *Barton*, (1875) L. R. 10 Q. B. 329, followed.

CASE stated by justices for Hertfordshire.

On April 13, 1910, an information was preferred against the respondents for that they being directors of the English Traders, Limited, were on December 31, 1909, knowingly parties to the default of that company in having [failed to hold a general meeting during the calendar year 1909, as required by s. 64 of the Companies (Consolidation) Act, 1908.

On the same date an information was also preferred against the respondents by the appellant, who was a minor staff officer of the Companies Registration Department, Somerset House, for that they did on January 22, 1910, knowingly and wilfully permit default to be made by the said company in forwarding to the Registrar of Companies at Somerset House a copy of its list of members, with summary as to capital and shares, &c., for the year 1909, as required by s. 26 of the Act of 1908 (1), and

(1) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26:

"(1.) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after

that the said default had since continued for the space of sixty-seven days thereafter and still continued.

Upon the hearing of the informations the following facts were proved. English Traders, Limited, was incorporated on March 25, 1907, under the Companies Acts, 1862 to 1900, as a company limited by shares. The company had a nominal capital of 30,000*l.* divided into 30,000 shares of 1*l.* each. The respondents were at all material times directors of the company. General meetings of the company had been duly held on November 15, 1907, and on December 7, 1908, and the annual list of members and summary for those years had been duly forwarded to and filed by the Registrar at Somerset House.

No general meeting of the company had been held in 1909 and the company was in default in that respect, and the respondents were each of them knowingly parties to this default.

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the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

"(2.) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return . . . . by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—" (Here follows a number of particulars with regard to the capital of the company and other matters.)

"(3.) The summary must also . . . . include a statement . . . . in the form of a balance-sheet . . . . containing a summary of its share capital, its liabilities, and its assets, ... , but the balance-sheet need not include a statement of profit and loss.

"(4.) The above list and summary . . . . must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the Registrar of Companies a copy signed by the manager or by the secretary of the company.

"(5.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty."

1911

PARK v. LAWTON.

No annual list of members and summary had been forwarded to the Registrar of Joint Stock Companies during 1909; each of the respondents was aware of this default, if it were a default in law, and knowingly and wilfully permitted the default to continue.

The justices convicted the respondents of the offence charged in the first information.

With regard to the second information, it was contended on the part of the appellant that the respondents should be convicted; that the case was governed by *Edmonds* v. *Foster* (1); that the words in s. 26 of the Companies (Consolidation) Act, 1908, "on the fourteenth day after the first or only ordinary general meeting in the year," were words directory as to time only; and that the company was in default in not forwarding the annual list of members and summary.

On the part of the respondents it was contended that the case was governed by *Reg.* v. *Newton* (2), and that, no general meeting having been held in 1909, it was impossible to make up the list required by s. 26, and that the respondents could not, therefore, be convicted of a default for omitting to do that which in fact it was impossible for them to do; and further that the time did not begin to run until after the date of the meeting mentioned in s. 26.

The justices were of opinion that although the annual list of members and summary had not been forwarded as provided by s. 26, yet, there having been no general meeting held in 1909, they could not convict the respondents.

The question for the opinion of the Court was whether the decision of the justices with reference to the second information was correct in point of law.

Sir John Simon, S.-G. (*Sargant, Rowlatt,* and *Hamar Greenwood* with him), for the appellant. The respondents should have been convicted on the second information. They contended that they had committed no offence under s. 26 because, no general meeting having been held, it was impossible to comply with the requirements of the section; but a person cannot be

(1) (1875) 45 L. J. (M.C.) 41. (2) (1879) 48 L. J. (M.C.) 77.

heard to say that he has not broken the law when the non-performance of the condition precedent relied on as a defence was itself a breach of the law committed by the same person. The words "on the fourteenth day after the . . . . general meeting" in s. 26 are not mandatory, but merely directory, and the meaning of the Act is that just as a general meeting is to be held in each year, so also the list of members is to be filed in each year, and therefore the offence in this case is alleged on January 22, which is the day after the completion of the maximum period (i.e., fourteen days plus seven days) allowed after the end of the year, 1909, in which no list of members had been filed. The fact that s. 26 makes the offence a continuing one also shews that the obligation to file the list is independent of the holding of a general meeting. In *Gibson* v. *Barton* (1) it was expressly decided that the fact that a general meeting had not been held was no defence to a charge of committing an offence under ss. 26 and 27 of the Companies Act, 1862, the provisions of which correspond with s. 26 of the Act of 1908. The decision in *Edmonds* v. *Foster* (2) was to the same effect. *Reg.* v. *Newton* (3), which the justices thought covered the present case, is distinguishable, because the decision proceeded on the ground that, the summons having alleged in terms that the default was made after the general meeting had been held, it became essential to prove when the meeting was held as a matter of fact, and in the absence of proof the Court held that the summons was rightly dismissed; and *Gibson* v. *Barton* (1) was not cited to the Court in *Reg.* v. *Newton.* (3) *Dorté* v. *South African Super-Aeration, Ld.* (4) at first sight appears to be in favour of the respondents; but as the arguments and judgments are not reported, it is not easy to know exactly what were the grounds of the decision. A possible explanation of the case is that there was no evidence that the defendant was responsible for the failure to hold the annual general meeting; though it is not admitted that even if that were so it would be a good defence.

The respondents did not appear.

(1) L. R. 10 Q. B. 329.
(2) 45 L. J. (M.C.) 41.
(3) 48 L. J. (M.C.) 77.
(4) (1904) 20 Times L. R. 425.

1911

PARK v. LAWTON.

LORD ALVERSTONE C.J. I regret that we have not had the advantage of hearing an argument on behalf of the respondents, but I think we have had all the relevant authorities brought to our attention, and in my opinion the contention of the appellant is well founded. The question turns on the meaning of s. 26 of the Companies (Consolidation) Act, 1908, and it is not unimportant to point out that although the Companies Act, 1862, contained provisions similar to those of s. 26, it was not until the Companies Act, 1907, that a penalty was imposed for a default in holding an annual general meeting. Sect. 26 of the Act of 1908 provides that once at least in every year a list is to be made of all persons who "on the fourteenth day after the first or only ordinary general meeting in the year are members of the company," and the section goes on to say that that list must contain, in addition to full particulars with regard to the individual shareholders and the shares held by them, a summary specifying a number of most important particulars, including an audited statement of accounts, giving such particulars as are included in the annual balance-sheet other than the statement of profit and loss. Sub-s. 5 of s. 26 imposes a penalty if default is made in complying with the requirements of the section. The cases of *Gibson* v. *Barton* (1) and *Edmonds* v. *Foster* (2) are clear authorities that a person charged with an offence under s. 26 is not entitled by way of defence to plead the impossibility of complying with s. 26 by reason of no general meeting having been held, at any rate if the person charged was also a party to the default in holding the meeting; in other words, a person charged with an offence cannot rely on his own default as an answer to the charge. If it were the case that everything required to be inserted in the list was dependent on the fact of the general meeting having been held, it might perhaps have been contended with some force that it is impossible to calculate a continuing penalty from a day which has never come into existence; but when one sees that s. 26 requires a number of most important matters to be included in the list of members which are entirely independent of the holding of a general meeting, this very much weakens the contention that no list need be compiled if, owing to the failure to hold a general

(1) L. R. 10 Q. B. 329. (2) 45 L. J. (M.C.) 41.

1911

PARK v. LAWTON.

Lord Alverstone C.J.

meeting, it is impossible to say what day is the fourteenth day thereafter.

With regard to the case of *Reg.* v. *Newton* (1), speaking for myself, I do not share the doubts which Cockburn C.J. appears to have felt as to the correctness of the decision in *Edmonds* v. *Foster* (2), but, in any case, Cockburn C.J. expressly stated that he had no intention of overruling *Edmonds* v. *Foster* (2); and the other authority in point, *Gibson* v. *Barton* (3), was not cited to the Court in *Reg.* v. *Newton.* (1) In *Dorté* v. *South African Super-Aeration, Ld.* (4) there was no question of the defendant being also in default as to the general meeting, and that decision, therefore, in no way conflicts with the earlier authorities.

For these reasons I am of opinion that it was no defence to the charge under s. 26 for the respondents to rely on the fact that there had been no general meeting held, the respondents themselves having been parties to the default in holding the general meeting. The appeal will therefore be allowed, and the case must be remitted to the justices for them to convict the respondents on the second information.

HAMILTON and AVORY JJ. concurred.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*

(1) 48 L. J. (M.C.) 77.
(2) 45 L. J. (M.C.) 41.
(3) L. R. 10 Q. B. 329.
(4) 20 Times L. R. 425.

F. O. R.

1911
Jan. 17.

HALLIDAY, Appellant *v.* TAFFS, Respondent.

Seaman—Desertion in Australian Port—Prohibited Immigrant—Fine imposed on Master—Expenses caused by Absence due to Desertion—Reimbursement—Merchant Shipping Act, 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

A ship in the course of a voyage arrived at Brisbane, at which port a Chinaman, who was a member of the crew, deserted. In respect of this desertion the master of the ship was fined 100*l.* by a Court of summary jurisdiction at Brisbane under an Act of the Commonwealth of Australia which imposed that penalty upon the master of any ship from which a prohibited immigrant, as the Chinaman was, entered the Commonwealth:—

Held, that the fine of 100*l.* was not "an expense" caused to the master of the ship by the absence of the seaman due to desertion within s. 28, sub-s. 1 (*b*), of the Merchant Shipping Act, 1906, and that the master was, therefore, not entitled to be reimbursed out of the wages of the seaman.

Case stated by the stipendiary magistrate for the borough of West Ham.

An appeal was entered at the West Ham Police Court by the appellant under s. 28 of the Merchant Shipping Act, 1906 (1),

(1) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 28:

"(1.) If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall subject to the provisions of this section—

"(*a*) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind; and

"(*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, one (in this section referred to as the delivery account) of the effects and wages, and the other (in this section referred to as the reimbursement account) of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under section two hundred and twenty-one of the principal Act. The master shall, if required by the proper officer, furnish such vouchers as may be

against the decision of the respondent, the superintendent of the Mercantile Marine Office, Connaught Road, Victoria Docks, London, refusing to allow the appellant to be reimbursed certain sums out of the wages and effects of one Ah Ching, a member of the crew of the steamship *Crown of Gallicia*. On the hearing of the appeal the following facts were proved or admitted:—

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reasonably required to verify the accounts.

"(3.) The master of the ship shall be entitled to be reimbursed out of the wages or effects any sums shown in the reimbursement account which appear to the proper officer or, in case of an appeal under this section, to a Court of summary jurisdiction to be properly chargeable, and for that purpose the officer, or, if necessary, in the case of an appeal, the Board of Trade, shall allow those sums to be deducted from the amount due on account of wages shown in the delivery account, and, so far as that amount is not sufficient, to be repaid to the master out of the effects . . . .

"Where the master of a ship whose voyage terminates in the United Kingdom is aggrieved by the decision of the proper officer as to the sums to be allowed as properly chargeable on his reimbursement account, and the amount in dispute exceeds ten pounds, he may appeal from the decision of the proper officer to a Court of summary jurisdiction."

Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 221: "If a seaman lawfully engaged . . . . commits any of the following offences he shall be liable to be punished summarily as follows:—

"(*a*) If he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, ... and also, except in the United Kingdom, he shall be liable to imprisonment . . . .

"(*b*) If he neglects . . . . to join his ship . . . . or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall . . . . be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days pay, or any expenses properly incurred in hiring a substitute; and also . . . . he shall be liable to imprisonment . . . ."

Sect. 232: "(1.) Where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer, and carried to the Consolidated Fund."

1911

HALLIDAY v. TAFFS.

The appellant was at all material times the master of the steamship *Crown of Gallicia*. On April 15, 1909, Ah Ching, a Chinaman, signed articles at Glasgow for a voyage on the said ship at 3*l*. 10*s*. per calendar month wages. In the course of the voyage the ship arrived at Brisbane, Queensland, in the Commonwealth of Australia, with Ah Ching on board. On November 13, 1909, Ah Ching, without the knowledge, complicity, or negligence of the appellant, deserted from the ship or was guilty of an offence within the meaning of s. 28, sub-s. 1 (*b*), of the Merchant Shipping Act, 1906. On the date of his desertion or of the offence aforesaid there were due to Ah Ching wages to the amount of 16*l*. 15*s*. 7*d*. He left on board the ship the following effects:—Two blankets, one shirt, one pair of Chinese pants, one white jacket, two pairs of underpants, one clock, and one box. The fact of the desertion or offence and the amount of wages due to Ah Ching and a list of his effects were duly entered in the official log in accordance with the provisions of the Merchant Shipping Acts.

Under the Immigration Restriction Acts, 1901—1905 (1), which are and at all material times were in full force and effect in the Commonwealth of Australia, the master or owner of any ship from which a prohibited immigrant enters the said Commonwealth is liable to be summoned before a Court of summary jurisdiction and upon conviction to be fined the sum

(1) Immigration Restriction Act, 1901 (No. 17 of 1901), s. 9: "The master, owners, and charterers of any vessel from which any prohibited immigrant enters the Commonwealth contrary to this Act shall be jointly and severally liable to a penalty not exceeding one hundred pounds for each prohibited immigrant so entering the Commonwealth.

"Provided that in the case of an immigrant of European race or descent no penalty shall be imposed under this section on any master owner or charterer who proves to the satisfaction of the Court that he had no knowledge of the immigrant being landed contrary to this Act, and that he took all reasonable precautions to prevent it."

Immigration Restriction Amendment Act, 1905 (No. 17 of 1905), s. 12: "Section nine of the Principal Act is amended — (*a*) by omitting the words 'jointly and severally liable to a penalty not exceeding,' and inserting in lieu thereof the words 'guilty of an offence against this Act, and be jointly and severally liable on summary conviction to a penalty of';

"(*b*) by omitting the whole of the second paragraph thereof."

1911

HALLIDAY v. TAFFS.

of 100*l.* or to be bound by a bond to pay the said sum. Ah Ching was a prohibited immigrant within the meaning of the said Acts. By reason of the desertion or offence of Ah Ching and as a consequence thereof the appellant was summoned before a Court of summary jurisdiction at Brisbane under the Immigration Restriction Acts, and was convicted and fined the sum of 100*l.*, which had been paid.

The following expenses were caused to the appellant by reason of the desertion or offence and in consequence thereof:—The said sum of 100*l.*; the sum of 1*l.* 7*s.* 6*d.* for cabling to the owners informing them of the desertion or offence and asking for instructions; the sum of 10*s.* for carriage hire, making inquiries for Ah Ching; the sum of 11*s.* 6*d.* in respect of a warrant issued at Brisbane for the arrest of Ah Ching; the sum of 1*s.* 7*d.* for a telegram from Sydney to Brisbane.

Upon the return of the ship to the United Kingdom on the termination of the voyage during which Ah Ching was left behind, the appellant furnished to the respondent, who was the proper officer under the terms of s. 28 of the Merchant Shipping Act, 1906, a delivery account shewing the effects left by and the wages due to Ah Ching when he left the ship, and a reimbursement account shewing the expenses, being those items set out above, which were caused to the appellant by the absence of Ah Ching and which were due to the desertion or offence. The respondent disallowed the two sums of 100*l.* and 1*l.* 7*s.* 6*d.* in the reimbursement account as being sums not properly chargeable against the wages and effects of Ah Ching.

Upon the part of the appellant it was contended that the two sums of 100*l.* and 1*l.* 7*s.* 6*d.* were expenses within s. 28, sub-s. 1 (*b*), of the Merchant Shipping Act, 1906, caused to the master or owner of the ship by reason of the desertion, neglect to join his ship, or other conduct of Ah Ching constituting an offence within s. 221 of the Merchant Shipping Act, 1894, and it was further contended that the same were properly chargeable by the appellant in his reimbursement account against the wages and effects of Ah Ching, and that the respondent should have allowed the same. On the part of the respondent it was

1911

HALLIDAY v. TAFFS.

contended that the two sums were not properly chargeable against the wages and effects of Ah Ching.

The magistrate was of opinion that the two sums in question were not properly chargeable against the wages and effects of Ah Ching and should not have been allowed. He therefore dismissed the appeal.

The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct decision in point of law.

J. R. Atkin, K.C., and *A. Neilson*, for the appellant. The question is whether the 100*l.* paid in respect of the fine and the 1*l.* 7*s.* 6*d.* paid by the appellant for cabling to his owners are "expenses caused to the master . . . . by the absence of the seaman in cases where the absence is due to desertion" within s. 28, sub-s. 1 (*b*), of the Merchant Shipping Act, 1906. In so far as that is a question of fact, it appears from the language used in the case that the magistrate has found the facts in the appellant's favour, for he has found as a fact that by reason of and in consequence of the desertion the appellant was fined. That finding of fact brings the case within the section, and the appellant is entitled to be reimbursed pro tanto out of the wages and effects of the deserter. Under s. 221 of the Merchant Shipping Act, 1894, where a seaman deserts, he forfeits his effects left on board and the wages which he has earned up to the time of his desertion, and by s. 232 wages and effects forfeited for desertion are to be applied towards reimbursing "the expenses caused by the desertion" to the master. Sect. 28 of the Act of 1906 is the machinery, and the only machinery, for carrying out the provisions of ss. 221 and 232 of the Act of 1894, and, therefore, the expenses referred to in s. 28 must be intended to refer to and to include the expenses caused by the desertion. No distinction can be drawn between expenses caused by absence due to desertion in s. 28 of the Act of 1906 and expenses caused by desertion in s. 232 of the Act of 1894. But even if any distinction can be drawn, the fine of 100*l.* was an expense directly caused by absence due to desertion. The slight difference between the

language of the two sections is probably due to the fact that s. 232 is dealing solely with desertion, whereas s. 28 refers to absence due not only to desertion but also to neglect to join the ship, or any other conduct constituting an offence under s. 221 of the Act of 1894. The 1*l.* 7*s.* 6*d.* stands in the same category as the 100*l.*

Sir Rufus Isaacs, A.-G. (*Sir John Simon, S.-G., Rowlatt,* and *Hamar Greenwood* with him), for the respondent. The short answer to the argument for the appellant is that it was not the absence of the seaman from the ship but his presence on shore in Australia which caused the appellant to be fined. The fine was not imposed because the man deserted, but because the appellant came to an Australian port with a prohibited immigrant on board who was able to and did land at that port. Sect. 28 was never intended to deal with cases of this kind; it relates to cases of expenses really and directly due to the absence of the seaman, such as the extra cost of hiring a substitute.

[He was stopped.]

Atkin, K.C., replied.

LORD ALVERSTONE C.J. I do not desire to express any opinion as to whether a claim of this kind ought to be resisted. We have only to deal with the point of law raised by the Board of Trade that the fine of 100*l.* which was imposed on the master of this ship is not an "expense" within the meaning of s. 28 of the Merchant Shipping Act, 1906; and, if we are right in the view we take, that it does not come within s. 28, I think it equally does not come within s. 232 of the Act of 1894. The Act of the Commonwealth to which we have been referred, which prohibits the immigration of certain persons into Australia, provides by s. 9 that the master of any vessel from which a prohibited immigrant enters the Commonwealth shall be liable to a penalty of 100*l.*, and, having regard to the language of the latter part of the section, I think we must assume for the purposes of this case that a deserter from a ship, who is not of European race, does "enter" the Commonwealth within the meaning of s. 9.

The next question to be considered is what was it that really caused this fine of 100*l.* to be imposed on the appellant? The

1911

HALLIDAY v. TAFFS.

Lord Alverstone C.J.

penalty is not one which automatically becomes due; proceedings have to be instituted by some one for its recovery; and, therefore, it seems to me that the imposition of the fine depends on two things—one, the entry of the Commonwealth by a prohibited immigrant, and the other, the institution of proceedings for the recovery of the penalty. Now I am aware that the magistrate has stated in the case, as a fact, that by reason of the desertion and in consequence thereof the appellant was fined, and I quite agree that that would be a finding in favour of the appellant if there were any evidence on which the magistrate could in law come to that conclusion, having regard to the language of s. 28 of the Act of 1906. [The Lord Chief Justice read s. 28, sub-s. 1 (*b*).] It is contended for the appellant that this fine was an expense caused to the appellant by the absence of the seaman due to desertion. In one sense that contention is right, for it cannot be disputed that but for the desertion there would have been no fine; but it does not necessarily follow that, because the man deserted and the appellant was in consequence fined, the fine was an expense caused by the absence of the seaman due to desertion within the meaning of s. 28. Our attention was called to s. 221 of the Act of 1894, which provides that a seaman who deserts his ship shall forfeit all the wages which he has then earned, but in my opinion the fact of the forfeiture of the wages does not help us to decide whether a particular payment is an expense which may be set off against the wages; and s. 221 is not to my mind so important as s. 232, which provides that the forfeited wages shall be applied "towards reimbursing the expenses caused by the desertion." Speaking for myself, I am not disposed to decide this case against the appellant upon any distinction between s. 232 and s. 28. I think that if the appellant is right in saying that this fine was an expense caused by desertion within s. 232 it would also be an expense caused by the absence of the seaman due to desertion within s. 28. The language of s. 28 is perhaps a little narrower than the language of s. 232, but as at present advised I think that the effect of the language is the same. The conclusion at which I have arrived, however, is that there is no evidence in this case on which we can hold, as a matter of law, that this fine was

either an expense caused by the desertion, or an expense caused by the absence of the seaman due to the desertion. If the man had deserted from the appellant's ship and had sailed from the port on another ship the expense to the master, within s. 28, would have been the same; but the fine of 100*l.* was imposed, not because the man deserted, but because, having left the ship, he entered the Colony and thereby caused the appellant to become liable to the penalty imposed by the Commonwealth Act.

I at first doubted whether the expense of cabling to the owners stood in the same category as the fine, but one knows from one's own experience that it would be a most unusual thing for a master to cable home to his owners merely because a Chinaman had deserted, and the cablegram was really sent because there was a possibility that the ship might be held liable if proceedings were taken. I cannot, therefore, draw any distinction between the 100*l.* and the 1*l.* 7*s.* 6*d.*

For these reasons I am of opinion that there was no evidence on which the magistrate could in law come to the conclusion that either sum was an expense within s. 28, and his decision must therefore be affirmed.

HAMILTON J. I agree. For the purpose of my decision I will read the findings of fact in the case in the manner most favourable to the appellant, that is to say, I will assume that, when the magistrate says that "by reason of the desertion and as a consequence thereof" the appellant was fined, he means that the desertion was one which in itself consisted in, and involved, the Chinaman's getting on shore, so that his presence on the soil of the Commonwealth as well as his absence from the ship was intended to be found by the magistrate. Nevertheless it does not seem to me that the two sums in question are sums which the appellant is allowed to deduct under s. 28, because I do not think that the fine of 100*l.* and the cost of the cable are matters which the Legislature intended to describe by the expression "any expenses caused to the master or owner of the ship by the absence of the seaman," and that conclusion is strengthened in the light of the sections of the Act of 1894 to which we have

1911

HALLIDAY v. TAFFS.

Hamilton J.

been referred. "Expenses" is not in itself an apt word to cover a penalty imposed for a breach of the law. The causation of this penalty involved the determination of some officer of the Commonwealth to prosecute the appellant and the determination of some Court to inflict a fine; and when one looks at the use of the word "expenses" in both s. 221 and s. 232 of the Act of 1894 it seems to me clear from the context that the word refers to expenses directly caused, such as disbursements in the nature of payments for service substituted for that which the deserter ought to have rendered. That view, which can only be stated, and is not susceptible of elaborate justification, seems to be corroborated by s. 225 of the Act of 1894, which, in dealing with a matter very closely analogous to the present one, uses a different expression from "expenses." Sect. 225, sub-s. 1 (*g*), says that if a seaman "is convicted of any act of smuggling whereby loss or damage is occasioned to the master or owner of the ship, he shall be liable to pay to that master or owner a sum sufficient to reimburse the loss or damage."

I cannot help thinking that, if the Legislature in 1906, in passing the new Act in substitution for certain sections in the Act of 1894, had intended "any expenses caused" to include a fine imposed upon the master of a ship because the result of the seaman's offence (desertion) was to entangle him in a liability under the Commonwealth laws, it would not have used the expression which is used, but would have said "if, by reason of the desertion, loss or damage is occasioned to the master, then the seaman's wages shall be made liable to reimburse that loss or damage." I agree, therefore, that the appeal fails.

AVORY J. I am of the same opinion. I doubt whether a fine such as this can be properly called an "expense" within the meaning of this Act of Parliament. If a servant or commercial traveller were entitled to charge his employer with his expenses when away from home, I do not think he could properly include in those expenses a fine which had been imposed upon him for getting drunk while he was away. But assuming that the fine imposed on the appellant could be called an expense, I am clearly of opinion that it is not an

expense caused by the absence of the seaman within the meaning of s. 28 of the Act of 1906.

1911

HALLIDAY v. TAFFS.

Appeal dismissed.

Solicitors for appellant: *Botterell & Roche.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

F. O. R.

BROWN, APPELLANT *v.* CROSSLEY, RESPONDENT.

1911

Jan. 18.

Motor Car—User at Night without Rear Light—Motor Car (Registration and Licensing) Order, 1903, *art. XI.—Conviction—Indorsement of Licence—Offence under the Motor Car Act*, 1903—*Offence in connection with Driving—Motor Car Act*, 1903 (3 *Edw.* 7, c. 36), *s.* 2, *sub-s.* 4; *s.* 4, *sub-s.* 1 (*c*), *sub-s.* 2.

Sect. 4 of the Motor Car Act, 1903, provides that any Court before whom a person is convicted of an offence "under this Act or of any offence in connection with the driving of a motor car" shall cause particulars of the conviction to be indorsed on his licence; and failure to produce a licence for the purposes of indorsement is made an offence.

The respondent having been convicted of using a motor car at night on a public highway without having a lamp burning on the back of the car as required by art. XI. of the Motor Car (Registration and Licensing) Order, 1903, was called upon to produce his licence for the purposes of indorsement, and, having failed to do so, he was charged with the commission of an offence under s. 4 of the Act of 1903. The justices dismissed the charge:—

Held, that the respondent should have been convicted, as the offence of which he had been convicted was an offence under the Motor Car Act, 1903.

Held, further, by Lord Alverstone C.J. and Avory J., that it was also "an offence in connection with the driving of a motor car."

CASE stated by justices for the West Riding of Yorkshire sitting at Halifax.

On June 2, 1910, an information was laid by the appellant, Edward Brown, against the respondent, Charles Crossley, alleging that the respondent on April 30, 1910, having been convicted before a Court of summary jurisdiction at Halifax of an offence under the Motor Car Acts, 1896 and 1903 (1),

(1) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2: "During the period between one hour after sunset and one hour before sunrise, the person in charge of a light locomotive shall carry

1911

BROWN v. CROSSLEY.

and an offence in connection with the driving of a motor car, and holding a licence under such Acts, had unlawfully failed to produce his licence within a reasonable time for the purposes of indorsement.

Upon the hearing of the information the following facts were proved or admitted:—

The appellant was the superintendent of police for the West

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attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations to be made by the Local Government Board."

Sect. 6: "(1.) The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used."

Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2:

"(4.) If a car is used on a public highway without being registered, or if the mark to be fixed in accordance with this Act is not so fixed, or if, being so fixed, it is in any way obscured or rendered or allowed to become not easily distinguishable, the person driving the car shall be guilty of an offence under this Act, unless, in the case of a prosecution for obscuring a mark or rendering or allowing it to become not easily distinguishable, he proves that he has taken all steps reasonably practicable to prevent the mark being obscured or rendered not easily distinguishable."

Sect. 4: "(1.) Any Court before whom a person is convicted of an offence under this Act or of any offence in connection with the driving of a motor car, other than a first or second offence consisting solely of exceeding any limit of speed fixed under this Act—

"(c) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the Court made under this section to be indorsed upon any licence held by him, and shall also cause a copy of these particulars to be sent to the council by whom any licence so indorsed has been granted..

"(2.) Any person so convicted, if he holds any licence under this Act, shall produce the licence within a reasonable time for the purposes of indorsement, and if he fails to do so shall be guilty of an offence under this Act."

Sect. 7: "(1.) The Local Government Board may, under section 6 of the Locomotives on Highways Act, 1896 (in this Act referred to as the principal Act), make regulations—

"(a) providing generally for facilitating the identification of motor cars, and in particular for determining and regulating the size, shape and character of the identifying marks to be fixed under this Act, and the mode in which they are to be fixed and to be rendered easily distinguishable whether by night or by day . . . ."

1911

BROWN v. CROSSLEY.

Morley petty sessional division, and the respondent was the holder of a licence authorizing him to drive a motor car. On April 30, 1910, the respondent (who pleaded not guilty) was convicted in the terms following, namely, "for that the defendant on April 19, 1910, at the parish of Barkisland in the said Riding during the period between one hour after sunset and one hour before sunrise unlawfully used a motor car on a public highway, to wit, Stainland Road, without having a lamp burning on such car so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of such motor car, contrary to the regulations (1) duly made under the Locomotives on Highways Act, 1896, and contrary to the form of the statute in such case made and provided." The respondent was afterwards called upon by the clerk of the justices to produce his licence for the purpose of indorsement in accordance with s. 4 of the Motor Car Act, 1903, but he failed to do so.

It was submitted, on behalf of the appellant, that the respondent ought to be convicted for failing to produce his licence on the ground that the offence of which he had been convicted on April 30, 1910, was an offence under s. 2, sub-s. 4, of the Motor Car Act, 1903, and was consequently an offence in regard to which indorsement is required by s. 4 of the Act.

Upon the hearing the respondent tendered no evidence, and did not prove that he had taken all steps reasonably practicable to prevent the mark that was required to be fixed on the car in accordance with the Motor Car Act, 1903, s. 2, from being obscured or rendered not easily distinguishable.

(1) The Motor Car (Registration and Licensing) Order, 1903 (stated therein to have been made by the Local Government Board in pursuance of the powers given to the Board by the Locomotives on Highways Act, 1896, and the Motor Car Act, 1903):

"Article XI.—Whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway, a lamp shall be kept burning on the car, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of the motor car or of any vehicle attached to the back of the motor car, as the case may be."

1911

BROWN v. CROSSLEY.

It was further submitted, on behalf of the appellant, that the regulations contained in the order of the Local Government Board relating to the mode in which identifying marks are to be fixed and to be rendered easily distinguishable were made (inter alia) in amplification of s. 2 of the Motor Car Act, 1903, and that failure to comply with such regulations was primarily an offence under s. 2, sub-s. 4, of the Act of 1903.

It was further submitted on behalf of the appellant that the offence of which the respondent was convicted was an offence in connection with the driving of a motor car, and was consequently an indorsable offence as contemplated by s. 4 of the Act of 1903. In support of this contention it was urged that it was only when the motor car was being driven or used on a public highway that the requirements of s. 2, sub-s. 4, of the Act of 1903 and the regulations of the Local Government Board in relation thereto were applicable, and further that failure to keep alight the lamps on a motor car during the period prescribed by the said regulations would be a material element in any prosecution under s. 1 of the Act of 1903.

On behalf of the respondent it was submitted that he had not been charged with, nor had he been convicted of, nor had he committed any offence whatever under the Motor Car Act, 1903. He had been charged on an information, the terms of which were followed in the conviction set out above; and it was further submitted that when he was so charged and convicted the justices were bound by such conviction, and the respondent could not afterwards be held to have been convicted under s. 2, sub-s. 4, of the Act of 1903.

It was further submitted that he had not committed an offence in connection with the driving of a motor car within the meaning of s. 4, sub-s. 1, of the Act of 1903.

A majority of the justices was of opinion that (1.) the offence of which the respondent was convicted on April 30, 1910, was merely an offence against the said regulations and was not the subject of indorsement under s. 4 of the Act of 1903, and (2.) that the offence was not an offence in connection with the driving of a motor car. The information was, therefore, dismissed.

1911

BROWN v. CROSSLEY.

The questions for the opinion of the Court were: (1.) Was the offence the subject of the conviction of April 30, 1910, before referred to, an offence against the Motor Car Act, 1903? (2.) Alternatively, was the said offence an offence in connection with the driving of a motor car?

C. A. Russell, K.C., and *G. P. Langton*, for the appellant. The offence of which the respondent was convicted was a contravention of art. XI. of the Motor Car (Registration and Licensing) Order, 1903. That regulation was made under the powers conferred by s. 7 of the Motor Car Act, 1903, and is intended to be an amplification of the provisions of s. 2, sub-s. 4, of that Act. The respondent had therefore been convicted of an offence under the Act of 1903: *Rex* v. *Gill*. (1) The offence was also one in connection with the driving of a motor car: *Ex parte Symes* (2); and, on both grounds, he was bound under s. 4 of the Act of 1903 to produce his licence for the purposes of indorsement, and having failed to do so he should have been convicted.

George Elliott, K.C., and *G. F. Mortimer*, for the respondent. The respondent was not convicted of an offence under the Act of 1903. The conviction does not refer to that Act, but states in terms that the offence was a breach of the "regulations duly made under the Locomotives on Highways Act, 1896," and art. XI., the regulation in question, cannot be said to have been made under the Act of 1903, for the question of lights is dealt with in s. 2 of the Act of 1896. It was never intended that, for a minor offence such as this, the licence should be indorsed: *Rex* v. *Yorkshire (West Riding) Justices, Ex parte Shackleton*. (3) *Rex* v. *Gill* (1) is distinguishable because there the offence related, not to lighting, but to the marks on the identification plate, which is a matter dealt with by s. 2 of the Act of 1903, and the conviction expressly referred to that Act, but this conviction did not do so. Secondly, this was not "an offence in connection with the driving of a motor car." The omission to have a head light might be an offence within those words, because

(1) (1909) 100 L. T. 858. (2) (1910) 103 L. T. 428.
(3) [1910] 1 K. B. 439.

1911

BROWN v. CROSSLEY.

the head light is required for the driver's guidance, but the sole purpose of the rear light is to identify the car, and it has nothing whatever to do with the driving of the car.

LORD ALVERSTONE C.J. In my opinion the justices ought to have convicted the respondent. Sect. 4 of the Motor Car Act, 1903, provides in plain terms that any Court before whom a person is convicted of an offence under that Act or of any offence in connection with the driving of a motor car shall cause particulars of the conviction to be indorsed upon the licence held by the person so convicted, and the failure to produce the licence for the purposes of indorsement is itself made an offence under the Act. The respondent was convicted of the offence of using a motor car at night on a public highway without having a light on the back of the car. I will first deal with the question whether that was an offence in connection with the driving of a motor car. One must bear in mind what is the object of requiring lights to be used on motor cars at night. With regard to a head light Mr. Elliott admitted that its absence would be an offence connected with the driving of a car, because, he said, it was wanted for the purpose of enabling the driver to see his way. It is also wanted for the purpose of warning other persons using the road of the approach of the car. With regard to the rear light one has only to read art. XI. of the regulations to see how the presence or absence of that light is connected with the driving of a car. Art. XI. says in terms that the light shall be so contrived as to illuminate every letter or figure on the identification plate. The obvious purpose of that requirement is that a person, who is driving a car in such a manner that it becomes necessary to identify the car, shall by means of the rear lamp be easily identified. It is quite impossible to my mind to contend successfully that driving a car at night without a rear lamp is not an offence in connection with the driving of a motor car, and on this ground alone the justices ought to have convicted the respondent for failing to produce his licence for the purposes of indorsement.

But I desire to say a few words with regard to Mr. Elliott's contention as to the regulations. It was said that art. XI. of the

regulations was made solely under the Locomotives on Highways Act, 1896. The regulations do not purport to be so made, for they commence with a recital not only of s. 7 of the Act of 1896, but also of s. 7 of the Act of 1903, and it is stated in terms that the regulations are made in pursuance of the powers given to the Local Government Board by both Acts. I can see no objection to including in one set of regulations matters dealt with in both Acts, if there is statutory authority for so doing, and there is authority in the sections of the Acts which, as I have said, are recited in the regulations. It is, further, important to notice that the authority for making a regulation with regard to the use of the rear light for the purpose of facilitating identification occurs, not in the Act of 1896, but in s. 2, sub-s. 4, and s. 7 of the Act of 1903. That seems to me to support the view that art. XI. of the regulations was made under the Act of 1903 rather than under the Act of 1896. But it is quite clear to my mind that the argument that the regulations were made under the Act of 1896 alone is untenable.

With regard to the authorities, they are, with one possible exception, against the respondent's contention. *Rex* v. *Gill* (1) is admittedly against him, if my view as to the regulations is correct, and so also is the case of *Ex parte Symes*. (2) It is said that some observations which I am reported to have made in *Rex* v. *Yorkshire (West Riding) Justices* (3) with regard to minor offences lend colour to the argument put forward on behalf of the respondent in this case. What I had in my mind was that there were some offences of a minor character, such as the accidental going out of a lamp, but my observations were made in a case which had reference to leaving a motor car standing on a highway, and it is going much too far to suggest that the effect of the decision in *Rex* v. *Yorkshire (West Riding) Justices* (3) is that the mere accidental going out of a lamp will result in a liability to have the licence indorsed.

In the present case, as I have already said, the offence of which the respondent was convicted was an offence in connection

(1) 100 L. T. 859.
(2) 103 L. T. 428.
(3) [1910] 1 K. B. 439. The observations referred to do not appear in the report of the case in the *Law Reports*.

1911

BROWN v. CROSSLEY.

Lord Alverstone C.J.

with the driving of a motor car, and for the reasons which I have stated I think it was also an offence under the Act of 1903. On both grounds the respondent should have been convicted, and this appeal must therefore be allowed.

HAMILTON J. I agree. The respondent was charged with failing to produce his licence for indorsement, which is made an offence by s. 4, sub-s. 2, of the Motor Car Act, 1903, and he ought to have been convicted if, on the previous occasion when he was before the justices, they convicted him either of an offence under the Act of 1903, or of an offence in connection with the driving of a motor car. As I am of opinion that they did convict him of an offence under the Act of 1903, it is not necessary to discuss whether it was also an offence in connection with driving, or to consider the bearing on this case of *Rex* v. *Yorkshire* (*West Riding*) *Justices*. (1) That the justices could, in the circumstances, have convicted him of an offence under the Act of 1903 is clear from the language of s. 2, sub-s. 4, of that Act and of art. XI. of the Motor Car (Registration and Licensing) Order, 1903. Those regulations were made after the passing of the Act of 1903, and art. XI. deals with a matter which had not previously been dealt with, but which it had become necessary to deal with by reason of the provisions of s. 2, sub-s. 4, of the Act of 1903, which makes it an offence if the mark on a car is obscured or allowed to become not easily distinguishable. It was admitted by Mr. Elliott that the decision in *Rex* v. *Gill* (2) would compel us to hold that the failure to produce the licence in this case was an offence, unless it could be shewn that, although the justices might have convicted the respondent of an offence under the Act of 1903, they had not in fact intended to do so, but had intended to convict him under the Act of 1896 only, reading art. XI. as having been made under the Act of 1896 alone. The original information and the conviction stated that the offence had been committed "contrary to the form of the statute in such case made and provided," and it is consistent with those words that the

(1) [1910] 1 K. B. 439. (2) 100 L. T. 859.

conviction was under the Act of 1903. The information in the present case says in terms that the previous conviction had been for an offence under the Acts of 1896 and 1903, and as the justices at no time purported to clear up the misapprehension, which according to the argument for the respondent must have existed, I think it is clear that they had in fact convicted the respondent under the Act of 1903, as they were, in my opinion, entitled to do. That being so, it became the duty of the justices to see that that conviction was indorsed on the licence, and the respondent, having failed to produce it for that purpose, should have been convicted.

AVORY J. I am of the same opinion. I prefer to base my judgment on the second ground, namely, that the respondent was convicted of an offence in connection with the driving of a motor car within s. 4, sub-s. 1, of the Act of 1903; but I do not desire to differ from the view of my Lord and Hamilton J. that the respondent was also convicted of an offence under the Act of 1903. I would point out that, unless that is so, persons driving motors the lamps of which happened to go out accidentally might be placed in a very awkward position, for if the offence under art. XI. of the regulations is not also an offence under sub-s. 4 of s. 2 of the Act of 1903, it would be no defence to prove that the lamp had gone out accidentally. Art. XI. merely says that the "lamp shall be kept burning," and unless that article is read as an amplification of sub-s. 4 of s. 2, the defence under the section that the defendant "has taken all steps reasonably practicable to prevent the mark being obscured" would not be applicable in a case where a person is charged with a contravention of art. XI.

Appeal allowed. Case remitted to justices to convict.

Solicitors for appellant: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

Solicitor for respondent: *G. D. Dean, for Hirst & Whitley, Halifax.*

F. O. R.

1910
Dec. 14.

THE KING *v.* JUSTICES OF HERTFORDSHIRE.

Justices—Summary Jurisdiction—Consent of Defendant to be tried summarily—Evidence given by Defendant and his Witnesses—Subsequent Committal—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *ss.* 12, 24, 27—*No Statutory Caution—Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *s.* 18—*Indictment at Quarter Sessions—True Bill—Jurisdiction of Quarter Sessions to try.*

The power of a Court of summary jurisdiction under s. 12 of the Summary Jurisdiction Act, 1879, to commit a person charged for trial may be exercised at any stage of the proceedings up to adjudication, notwithstanding that at an earlier stage the defendant has consented to the case being dealt with summarily and the hearing has proceeded on that basis to the close of the evidence for the defence.

A defendant charged with larceny before a Court of summary jurisdiction, having consented to the case being dealt with summarily, gave evidence, without being cautioned as required by s. 18 of the Indictable Offences Act, 1848, and called witnesses. At the close of the evidence, the justices were of opinion that it was not expedient to deal summarily with the case, and committed the defendant without his consent for trial at quarter sessions, where an indictment was preferred on which the grand jury returned a true bill. The Court of quarter sessions, on account of what had taken place before the Court of summary jurisdiction, declined to proceed with the trial of the indictment:—

Held, that the jurisdiction of quarter sessions to try the indictment was not ousted by any irregularity in the proceedings before the Court of summary jurisdiction.

Rule Nisi to the justices of Hertfordshire in quarter sessions to shew cause why a mandamus should not issue directed to them commanding them to try an indictment found on a true bill by the grand jury at quarter sessions against one Hale.

On September 24, 1910, the defendant Hale was charged with larceny before justices sitting as a Court of summary jurisdiction for the Albury petty sessional division of Hertfordshire. After the evidence for the prosecution had been heard the defendant was asked, in pursuance of s. 12 of the Summary Jurisdiction Act, 1879 (1), whether he wished to be tried by a

(1) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49):—

Sect. 12: "Where a person who is an adult is charged before a Court of summary jurisdiction with any indictable offence specified in the second column of the First Schedule to this Act, the Court if they think it expedient so to do, having regard to the character and antecedents of

jury, or whether he consented to the case being dealt with summarily by the justices, whereupon he stated that he wished the case to be dealt with summarily. The justices then proceeded to hear the evidence of the defendant and witnesses called for the defence, whose evidence went to establish, inter alia, an alibi. After hearing all the evidence the justices did not deal summarily with the case, being of opinion that by reason of the conflict of evidence the case had assumed a serious aspect, and,

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the person charged, the nature of the offence, and all the circumstances of the case, and if the person charged with the offence, when informed by the Court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence, and adjudge such person, if found guilty of the offence, to be imprisoned, with or without hard labour, for any term not exceeding three months, or to pay a fine not exceeding twenty pounds.

"For the purpose of a proceeding under this section, the Court, at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: 'Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?' with a statement, if the Court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which he will be tried if tried by a jury."

Sect. 24: "(1.) Where a person is charged before a Court of summary jurisdiction with an indictable offence, with which a Court of summary jurisdiction has or may have under the circumstances in this Act mentioned power to deal summarily, the Court before whom such person is charged, without prejudice to any other power that it may possess—

"(*a*) may, for the purpose of ascertaining whether it is expedient to deal with the case summarily, either before or during the hearing of the case, from time to time adjourn the case and remand the person accused . . . ."

Sect. 27: "Where an indictable offence is under the circumstances in this Act mentioned authorised to be dealt with summarily—

"(1.) The procedure shall, until the Court assume the power to deal with such offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when and so soon as the Court assume the power to deal with such offence summarily, the procedure shall be the same from and after that period as if the offence were an offence punishable on summary conviction and not on indictment, and the provisions of the Acts relating to offences punishable on summary conviction shall apply accordingly."

1910

REX v. HERTFORDSHIRE JUSTICES.

without the consent of the defendant, they committed him for trial at the Hertfordshire quarter sessions. The caution required by s. 18 of the Indictable Offences Act, 1848 (1), had not been put to the defendant at the close of the case for the prosecution. At the quarter sessions an indictment was preferred against the defendant in respect of the said larceny. The grand jury found a true bill.

The defendant was then formally charged upon the indictment, but before he had pleaded his counsel applied to the Court to quash the indictment on the grounds, inter alia, (*a*) that the Court of summary jurisdiction had pursuant to the provisions of ss. 12 and 27 of the Summary Jurisdiction Act, 1879, with the consent of the defendant, assumed the power to deal with the case summarily and had proceeded to a summary trial, and that the offence had therefore become an offence to be dealt with summarily by the Court of summary jurisdiction, and that the particular offence alleged against the defendant had ceased to be an offence triable by the quarter sessions; (*b*) that notwithstanding the assumption of the above-named power the justices had committed the defendant for trial at the quarter sessions without having at any time complied with s. 18 of the Indictable Offences Act, 1848; (*c*) that the defendant had already been in

(1) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18: "And be it enacted, that after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial'; . . . . Provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise or favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat . . . . "

peril of conviction and sentence at the hands of the Court of summary jurisdiction.

The Court of quarter sessions came to the conclusion that under the circumstances above mentioned the regular procedure for the trial of the defendant was before the Court of summary jurisdiction; and that in committing him for trial that Court had violated the terms of the statute; but on the other hand, the grand jury having found a true bill, the Court was not prepared to say that the grand jury had acted beyond their powers, and the Court was therefore not satisfied that they could quash the indictment, which was not bad on the face of it. In these circumstances the Court of quarter sessions decided not to proceed with the trial of the case and to indorse the indictment "Not to be proceeded with without the leave of the Court."

Danckwerts, K.C., and *E. H. Tindal Atkinson*, for the justices, shewed cause against the rule. The proper procedure for the trial of a summary offence under s. 12 of the Summary Jurisdiction Act, 1879, having been followed, and the defendant having elected to be tried in a summary manner, the justices were bound to proceed to the conclusion of the trial in a summary manner, and had no power to commit for trial, unless something had occurred during the summary trial to oust their jurisdiction to convict. The effect of ss. 12 and 27 of that Act is that the defendant by consenting to the case being dealt with summarily acquires the right and privilege of being tried summarily with the accompanying limitation of punishment and the loss of his right of appeal. As was said by Lawrance J. in *Reg.* v. *Justices of London* (1), the effect of s. 12 is "that the person charged makes a kind of bargain with the magistrate to leave the decision of the matter to him instead of having it tried by a jury." The effect of following the procedure prescribed by ss. 12 and 27 is to render the offence one which can be tried summarily and in no other way. Nothing occurred during the course of the hearing before the justices to oust their jurisdiction to deal with the case summarily, as was the case in *Rex* v

(1) [1892] 1 Q. B. 664.

1910

REX v. HERTFORDSHIRE JUSTICES.

Beesby (1) and *Reg.* v. *Cockshott.* (2) Sect. 14 provides that the justices shall not deal summarily with a case if it appears to the Court that the offence is one which owing to a previous conviction is punishable by penal servitude. That is the only matter which entitles the justices to commit a defendant for trial, if the defendant has consented to the case being summarily dealt with and the hearing has subsequently proceeded on that basis. If, after the defendant has consented to be tried summarily and has called his witnesses, s. 12 entitles the justices in any case and at any time to change their minds and commit him for trial, the provisions of s. 14 are not required. As nothing occurred to prevent the justices from dealing with the case summarily, and the case had been dealt with to the end on that basis, the justices, when they came to the conclusion that the case was one which ought to be tried by a jury, should have commenced the proceedings de novo, and should have observed the formalities applicable to cases in which it is intended to commit a defendant for trial. But this was not done, and consequently the defendant gave his evidence without having been cautioned in the manner required by s. 18 of the Indictable Offences Act, 1848. The effect of the course adopted by the justices was to prejudice the defendant, for he was thereby induced to disclose his defence by giving evidence himself and by calling his witnesses, a course which he might not have adopted and would not have been compelled to adopt had he known that the justices were going to commit him for trial. The quarter sessions ought to have quashed the indictment, and not merely have decided not to proceed with it. When the offence charged had been dealt with summarily it ceased to be an indictable offence and an indictment would not lie in respect thereof: *Reg.* v. *Hall.* (3) The quarter sessions were right in deciding that they had no jurisdiction, and in refusing, to try the indictment. [*Stanley's Case* (4) was also referred to.]

Clarke Hall, for the defendant, also shewed cause against the rule. Sect. 3 of the Criminal Law Amendment Act, 1867

(1) [1909] 1 K. B. 849.
(2) [1898] 1 Q. B. 582.
(3) [1891] 1 Q. B. 747.
(4) (1570) Dyer, 296a.

(30 & 31 Vict. c. 35), shews that before a prisoner can be committed for trial he is entitled to exercise one of two alternative rights; he may either reserve his defence, or he may elect to call witnesses in his defence before the justices. In the present case the course of action pursued by the justices deprived the defendant of the power of exercising those rights, because, believing that the case was being dealt with summarily, he naturally called his witnesses, but non constat that he would have done so if he had known that he was going to be committed for trial.

Bodkin and *J. Harvey Murphy*, for the Crown in support of the rule. Under s. 12 of the Summary Jurisdiction Act, 1879, the justices remain seised of the charge until they have discharged themselves by adjudicating upon the case either by committing the defendant for trial or by convicting and sentencing him or by acquitting him. The first paragraph of s. 12 is merely enabling, not compulsory. The consent of the defendant to be dealt with summarily is required, because he is giving up his right to be tried by a jury; and also, now, his right of appeal. A defendant having given his consent, the justices may, not must, deal with the charge summarily, if they think it expedient, "having regard to the character and antecedents" of the defendant, "the nature of the offence, and all the circumstances of the case." The justices might very well think, as they did in this case, at the close of the case for the prosecution, that the charge is one which might properly be dealt with summarily, but the evidence called for the defence may throw such an entirely new light on the nature of the offence or the character of the prisoner as to shew that the case is much too important to be dealt with summarily, or that it is one in which the maximum sentence of three months' imprisonment with hard labour authorized by s. 12 would be quite inadequate. In cases of that kind the justices are not precluded from sending the defendant for trial merely because he has consented to be dealt with summarily, and the formalities prescribed by the second paragraph of s. 12 in cases of a summary trial have been observed. The provisions of s. 14 have not the effect of limiting the plain meaning of the language of s. 12. It is to be observed that under s. 24 the

1910

REX v. HERTFORDSHIRE JUSTICES.

justices may adjourn a case from time to time for the purpose of ascertaining whether it is expedient to deal with it summarily, and there is nothing in the language of s. 24 to suggest that this power of adjournment cannot be exercised after the defendant has given evidence or has called witnesses. Sect. 27 does not affect this case. That section is required because the Act of 1879 for the first time empowered a Court of summary jurisdiction to impose a pecuniary penalty in cases of felony, and, therefore, sub-s. 1 of s. 27 makes applicable the provisions of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), as to the recovery of penalties in summary cases. It is true that all the formalities required by s. 18 of the Indictable Offences Act, 1848, were not observed before the defendant gave evidence. That omission does not oust the jurisdiction of quarter sessions to deal with the case. The object of s. 18 was to prevent incautious admissions by a defendant, and does not apply to a case like the present where a defendant voluntarily and on the advice of his solicitor gives evidence. The absence of the caution was in any case only an irregularity—*Reg.* v. *Sansome* (1); *Reg.* v. *Bird* (2)—and does not assist the argument that in the circumstances of this case the offence had become one which could only be dealt with by a Court of summary jurisdiction. If that were so, the proper course at quarter sessions would have been to plead to the jurisdiction. If the justices in petty sessions had not exclusive jurisdiction, it is immaterial to inquire whether there were irregularities in the committal, because any one may prefer an indictment at quarter sessions (except under the Vexatious Indictments Act, which does not apply here). A true bill was found on the indictment, and quarter sessions were bound to proceed with the trial. *Rex* v. *Beesby* (3) and *Reg.* v. *Cockshott* (4) are not in point, for they were cases under s. 17 of the Act of 1879, under which the case is prima facie one to be dealt with summarily. The decision in *Reg.* v. *Hall* (5) has no relevancy to the questions involved in this case. [*Rex* v. *Price* (6)

(1) (1850) 19 L. J. (M.C.) 143.
(2) (1898) 62 J. P. 760.
(3) [1909] 1 K. B. 849.
(4) [1898] 1 Q. B. 582.
(5) [1891] 1 Q. B. 747.
(6) (1805) 6 East, 323.

and *The Case of St. Andrew's, Holborn, and St. Clement Danes* (1) were also referred to.]

Danckwerts, K.C., by leave, replied.

LORD ALVERSTONE C.J. It does not appear to me to be necessary, for the purpose of deciding this case, to deal with all the points which have been raised in the course of the arguments. I will state shortly the material facts. A charge of larceny was preferred against the defendant before justices sitting as a Court of summary jurisdiction. At the close of the case for the prosecution the justices, thinking that the case was one which could properly be dealt with by them summarily, put to the defendant the proper questions as required by s. 12 of the Summary Jurisdiction Act, 1879, and in answer thereto the defendant stated that he wished the case to be dealt with summarily. The defendant proceeded to give evidence, and witnesses were called on his behalf, and then the justices took a different view of the case and came to the conclusion that the case was one which ought to go before a jury, and they accordingly committed the defendant for trial at quarter sessions. An indictment was preferred against the defendant at quarter sessions, and the grand jury found a true bill, but the Court of quarter sessions held that, in the circumstances, it ought not to proceed with the trial at quarter sessions.

I am of opinion that this rule ought to be made absolute on the ground that, an indictment having been properly found by the grand jury, there was a case for trial which quarter sessions ought to have heard and disposed of. I very much doubt whether anything that occurred at petty sessions could deprive quarter sessions of their jurisdiction to try that indictment, unless the effect of what took place at petty sessions was to cause the case to become one which could only be dealt with by a Court of summary jurisdiction; and it would, in my opinion, require very clear language to deprive quarter sessions of their jurisdiction to try a validly found indictment. Of course, if we were of opinion that the only result of ordering quarter sessions to hear and determine the case would be to bring about a decision

(1) (1703) 2 Salk. 606.

1910

REX v. HERTFORDSHIRE JUSTICES.

Lord Alverstone C.J.

that quarter sessions had no jurisdiction to hear it, we should not make the order asked for by the rule nisi. But I am unable to see how any point could be raised, either by a plea to the jurisdiction or by a motion to quash the indictment, which would be successful in ousting the jurisdiction of quarter sessions. What is said is, that after the defendant has consented under s. 12 to be dealt with summarily, and the justices have embarked on a summary trial of the charge, a state of things arises which deprives the justices of any power to change their minds afterwards and to commit the defendant for trial, or to do anything except adjudicate upon the case by either convicting or acquitting the defendant. The argument is based upon ss. 12 and 27 of the Summary Jurisdiction Act, 1879, the combined effect of which is said to be such that after a decision to deal summarily with a case has once been arrived at by the justices, with the consent of the defendant, the whole character of the proceedings is so altered that there ought not to be, and cannot be, any further proceedings in the case except upon the footing that the case is one which must be tried by a Court of summary jurisdiction and by no other Court. That argument appears to me to overlook the fact that s. 12 says that the Court of summary jurisdiction "may" deal summarily with the offence "if they think it expedient so to do," and that in considering whether it is expedient to do so the justices are to have regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case. I am unable to understand how it can be said that matters which are for the first time brought to the knowledge of the justices in the course of the defence of a person who has consented to be tried summarily are not to be regarded as part of the circumstances of the case, or as affecting the character of the defendant or the nature of the case. Take, for example, a case which has been presented by the prosecution as one of slight importance involving no serious imputation on the defendant's character, it may subsequently appear from matters elicited in the course of the defendant's cross-examination that he is a man of very bad character and that the particular offence charged is only one of a series of similar offences. It is impossible in my opinion to

say that, when those further facts are brought to the knowledge of the justices, the mere fact that the defendant has consented to the case being dealt with summarily precludes the justices from considering a second time whether it is in the circumstances expedient so to deal with it; and it is not disputed that in certain cases the justices may at any stage of the proceedings find themselves expressly prohibited from dealing with it summarily, for s. 14 provides that if owing to a previous conviction on indictment the offence is one punishable with penal servitude the Court shall not deal with the case summarily. It is in my opinion incorrect to say that the effect of the defendant consenting to be dealt with summarily is that the Court enters into a sort of bargain or contract with him not to deal with the case in any other manner. The conclusion I come to is that at any stage of the proceedings, up to the time of adjudicating upon the case by conviction and sentence, the justices are entitled to say that the case is one with which it is not expedient to deal summarily.

I was at first somewhat impressed by the fact that if the case was not going to be dealt with summarily the defendant would before giving evidence have received the statutory caution as required by s. 18 of the Indictable Offences Act, 1848, and he might possibly also have desired to postpone calling his witnesses until the trial; but it is important to remember in this connection that at the date of the passing of the Act of 1848 a prisoner could not give evidence, and that the object of s. 3 of the Criminal Law Amendment Act, 1867, was to enable a prisoner to call his witnesses before the justices if he desired to do so. In these circumstances the necessity for the caution under the Act of 1848 and the permission to call witnesses afford very little support to the theory that the defendant's consent to be dealt with summarily gives rise to something in the nature of a bargain with the justices from which they cannot afterwards draw back. At the utmost the absence of the caution cannot be treated as more than a mere irregularity. The authorities cited by Mr. Bodkin shew that, although the strict requirements of s. 18 have not been complied with, statements made by a prisoner before the justices may in certain circumstances be given in evidence against him at his

1910

REX v. HERTFORDSHIRE JUSTICES.

Lord Alverstone C.J.

trial, and having regard to the fact that a prisoner is now a competent witness at any stage I cannot hold that the absence of the caution affords any ground for suggesting that there has been in consequence such a change in the position of the defendant as to make it unjust subsequently to commit him for trial.

For these reasons I am of opinion that this rule must be made absolute.

PICKFORD J. I am of the same opinion. At one stage of the proceedings the justices were of opinion that the case was one which could properly be dealt with summarily by them. The defendant consented to that course, and the case was proceeded with on that footing up to the conclusion of the evidence for the defence. Then the justices changed their minds and came to the conclusion that the case had assumed such an aspect as rendered it necessary to send it for trial by a jury. It is said, and said correctly, that in doing that the justices failed to observe certain conditions which have to be observed when a defendant is going to be committed for trial. An indictment was then preferred against the defendant at quarter sessions on which the grand jury returned a true bill. The offence was larceny, and, the case not being within the Vexatious Indictments Act, it was open to the grand jury to find a true bill on the indictment without any committal at all. It is contended that quarter sessions had no jurisdiction to try that indictment, because, it is said, in consequence of what was done before the justices the case had become one which was triable at petty sessions only. It is clear that there is no express provision in the sections of the Summary Jurisdiction Act, 1879, to which we have been referred, whether read singly or collectively, which deprives quarter sessions of jurisdiction to try the defendant. Undoubtedly if the justices had proceeded to adjudicate on the case either by convicting or by acquitting the defendant, that would have afforded ground for a good plea to the indictment, but I cannot see why the fact that the justices at first said they would deal summarily with the case and afterwards changed their minds should be said to have deprived quarter sessions of jurisdiction. It was rather suggested that the consent of the defendant to a summary

trial constituted a bargain or contract with the justices that he should not be committed for trial; but even if there could be a bargain of that description, I am unable to understand how that bargain can oust the jurisdiction of quarter sessions to try an indictment on which the grand jury have found a true bill. The expression used by Lawrance J. in *Reg.* v. *Justices of London* (1) was "a kind of bargain," which is not the same thing as a bargain; but I am sure the learned judge did not mean to suggest that there was a binding contract, or one which could take away the jurisdiction of quarter sessions.

With regard to the irregularity of not giving the defendant the statutory caution before he gave evidence I only desire to say that the jurisdiction of quarter sessions in the circumstances of this case does not rest on the regularity of the proceedings at petty sessions. The omission to caution the defendant may or may not affect the question of the admissibility in evidence at quarter sessions of the statements made by the defendant at petty sessions, but it cannot deprive quarter sessions of jurisdiction to try this indictment.

AVORY J. I am of the same opinion. The only question we have to decide is whether quarter sessions had jurisdiction to try this indictment. It is said that by reason of what took place before the justices the offence ceased to be an indictable offence, and s. 12 of the Summary Jurisdiction Act, 1879, is relied on in support of that contention. Probably the most favourable way of putting the argument for the defendant is to say that, as soon as the justices have decided, with the consent of the person charged, to deal summarily with the case, he acquires a right to receive a sentence not exceeding the limit imposed by s. 12, that is, imprisonment with hard labour for a term of three months. I do not think the argument is sound. To give effect to it would produce an impossible and unworkable state of things in Courts of summary jurisdiction. The justices are only to deal summarily with the indictable offences specified in the First Schedule to the Act "if they think it expedient so to do," and they are to have regard "to the

(1) [1892] 1 Q. B. 664, at p. 666.

1910

REX v. HERTFORDSHIRE JUSTICES.

Avory J.

character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case." It would obviously be most improper for the justices to inquire into the character and antecedents of the person charged until, after having heard all the evidence, they have determined to convict him; if they did do so, and then proceeded to convict, the defendant could come to this Court and get the conviction quashed on the ground that the justices had wrongly admitted evidence as to character before conviction. But before deciding to commit a defendant for trial the justices must inquire into his character and antecedents, and s. 24 shews that the proper interpretation of s. 12 is that the justices may up to the last moment before adjudication reserve their decision as to whether they will deal summarily with the case or send the defendant for trial, for s. 24 expressly provides that the justices "may for the purpose of ascertaining whether it is expedient to deal with the case summarily, either before or during the hearing of the case, from time to time adjourn the case and remand the person accused." The meaning of that is, that after hearing the whole case, including anything the defendant himself chooses to say, the justices may adjourn the case in order that information may be obtained as to the character and antecedents of the defendant, and if they subsequently learn that the prisoner has a bad character they may then decide to commit him for trial.

The other point arises under s. 18 of the Indictable Offences Act, 1848, and if this were a case of an application to quash the committal on the ground of irregularity, the question whether there was in the circumstances a good committal might require very serious consideration; but that question does not arise, for the question whether the committal was good or bad does not affect the jurisdiction of quarter sessions to try this indictment.

Rule absolute.

Solicitor for the Crown: *Director of Public Prosecutions.*

Solicitors for the justices in quarter sessions: *J. N. Mason & Co., for Longmore, Hertford.*

Solicitor for defendant: *T. Duerdin Dutton.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1910
Dec. 6, 7, 8, 20.

KISH *v.* TAYLOR.

Shipping—Contract of Affreightment—Bill of Lading—Lien for Dead Freight —Deviation—Necessity for Deviation—Unseaworthiness.

Where a ship deviates from her voyage by putting into a port of refuge and the deviation is reasonably necessary for the safety of the ship and cargo, but the necessity for the deviation is due to the default of the shipowner in sending the ship to sea in an unseaworthy condition, the shipowner is debarred from asserting against the cargo owners a lien upon the cargo for dead freight conferred upon him by the bills of lading.

The principle of *Strang, Steel & Co.* v. *A. Scott & Co.*, (1889) 14 App. Cas. 601, applied.

Appeal from a decision of Walton J. (1)

The plaintiffs were the owners of the steamship *Wearside*, and by a charterparty dated December 18, 1907, chartered her to the Mississippi Transportation Company to proceed to Mobile and Pensacola and there load a full and complete cargo of pitch pine timber and to carry the same to Dunkirk, Rotterdam, and Liverpool. By the terms of the charterparty the master or owners were "to have an absolute lien for all freight, dead freight, demurrage, and average." In pursuance of the charterparty the *Wearside* proceeded to Mobile and Pensacola and there loaded 801 standards only, the vessel being capable of carrying 1463 standards. Having loaded the 801 standards, the charterers declared themselves unable to load any more, and thereupon the plaintiffs, in mitigation of the loss arising from the charterers' breach of contract in failing to load a full and complete cargo, procured other cargo amounting to 661 standards, with which they filled up the vessel. The freight obtained in respect of these 661 standards was less than the chartered freight by a sum of 1387*l.* The *Wearside* being so loaded started on her voyage. At the time she did so she was in fact unseaworthy, owing to an excessive quantity of the cargo being piled upon the deck to a height of eighteen feet. Shortly after she had started she met

1) [1910] 2 K. B. 309.

C. A. 1910

KISH v. TAYLOR.

with heavy squalls which caused her to lurch to port, and before she could recover herself the deck cargo had shifted, carrying away the lashings and tearing up some of the deck plates. The water poured into the holds through the holes in the deck, and it became necessary to put the ship into a port of refuge. She accordingly proceeded to Halifax, where temporary repairs were effected, and the vessel proceeded on her voyage. The necessity for putting into Halifax was, as the judge found, due to her unseaworthy condition at the time when the voyage commenced. The defendants were the holders of bills of lading of a portion of the timber shipped by the charterers. By the terms of the bill of lading the consignees were to pay freight for the goods at the rate therein specified, "all other conditions as per charterparty." The defendants' timber was to be delivered in Liverpool, and on arrival of the ship at that port the plaintiffs claimed to exercise a lien upon that timber for the said sum of 1387*l.* as being dead freight, and the defendants, in consideration of the plaintiffs delivering the cargo, undertook to pay the amount, if any, for which a Court might hold that the plaintiffs were entitled to exercise their lien. The action was brought upon that undertaking.

Walton J. held, first, that the deviation was justifiable and proper although the necessity for it was caused by the plaintiffs' wrongful act in sending the ship to sea in an unseaworthy condition, and that consequently the defendants were not relieved from the obligations imposed by the bills of lading; secondly, that the lien given by the bills of lading included a lien for unliquidated damages in respect of the loss suffered by the plaintiffs in consequence of a full cargo not having been shipped. He therefore held that the plaintiffs were entitled to a lien on the defendants' timber for the damages above mentioned, and he gave judgment in their favour for 435*l.* 19*s.* 11*d.*

The defendants appealed. There was also a cross-appeal by the plaintiffs asking that the judgment might be varied in so far as it limited the amount to which the plaintiffs were entitled to 435*l.* 19*s.* 11*d.* by increasing the sum to which they were entitled to at least 815*l.* 15*s.* 4*d.*, upon the ground that in such judgment excessive debits were made against the freight that would have been earned under the charterparty

in respect of brokerage and address commission, and also that credit was given for an excessive amount of substituted cargo and freight and that an insufficient amount was debited against substituted earnings for expenses.

Atkin, K.C., and *Holman Gregory, K.C.*, for the appellants. The deviation in this case was rendered necessary by the default of the shipowner, it being admitted that the ship started on the voyage in an unseaworthy condition. Deviation under such circumstances is sufficient to avoid the contract of affreightment, just as a voluntary deviation would avoid it. Warranty of seaworthiness is a condition precedent the breach of which must avoid the contract. That being so, the respondents cannot recover. They are in no better position than if the deviation itself had been unnecessary. This case is covered by *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) and *Strang, Steel & Co.* v. *A. Scott & Co.* (2) The reasoning in *The Europa* (3), where *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) was distinguished, is very unsatisfactory.

[They were stopped by the Court.]

Bailhache, K.C., and *Adair Roche*, for the respondents. It is admitted that the deviation was necessitated by the unseaworthiness, but the question is whether putting into a port of refuge under such circumstances was such a deviation as would avoid the contract. It is submitted that it was not. It is only a voluntary deviation which will have that effect: Park on Marine Insurance, p. 619.

There is no case in which deviation rendered necessary by unseaworthiness has been held sufficient to avoid the contract. Where a ship starts on a voyage insufficiently stored it is not an improper deviation to put into port in order to replenish. When necessary for the safety of the ship it is the duty of the master to put into the nearest port of refuge: Carver on Carriage by Sea, s. 402. No doubt, if the deviation is due to unseaworthiness, the expenses of such deviation cannot be recovered in general average, but fall on the shipowner. But that is entirely

(1) [1907] 1 K. B. 660. (2) 14 App. Cas. 601.
(3) [1908] P. 84.

C. A. 1910

KISH v. TAYLOR.

different from saying that the respondents cannot enforce the special contract of affreightment evidenced by the bills of lading: Ruling Cases, vol. 9, p. 416; *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1); *Forshaw* v. *Chabert* (2); *Weir* v. *Aberdeen* (3); Arnould on Marine Insurance, p. 555, s. 429; *Guibert* v. *Readshaw.* (4)

If a vessel be tendered to carry by sea in an unseaworthy condition the charterer is entitled to refuse to load. If he has put cargo on board and the goods have been carried, then the unseaworthiness does not avoid the charterparty, and the charterer's remedy is to sue the shipowner for damages for breach of warranty. "Seaworthiness" does not stand on the same footing as non-deviation. It is not to be classed with non-deviation as a condition precedent, the non-performance of which avoids the contract of affreightment: *The Europa* (5); *Havelock* v. *Geddes* (6); *Schloss* v. *Heriot* (7); Carver on Carriage by Sea, s. 177.

There is nothing in the authorities to shew that mere unseaworthiness is sufficient to avoid the contract: *Steel* v. *State Line Steamship Co.* (8); *Kopitoff* v. *Wilson* (9); *The Glenfruin.* (10) In *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (11) there was no unseaworthiness. It was pure deviation.

Deviation will not avoid the charterparty unless it be voluntary and intentional. If it be demanded by the duty to save life or property it does not avoid the contract. The Court will not inquire into the reason why it was necessary. Unseaworthiness is no answer to a claim arising upon the charterparty except to the extent to which it has caused the damage.

There was no such deviation here as to avoid the contract. The law is well settled by *Steel* v. *State Line Steamship Co.* (8)

[At the conclusion of the respondents' arguments upon the appeal, COZENS-HARDY M.R. intimated that the Court would

(1) (1870) L. R. 3 P. C. 234.
(2) (1821) 3 Brod. & B. 158.
(3) (1819) 2 B. & Ald. 320.
(4) (1781 2 Park, 637.
(5) [1908] P. 84.
(6) (1809) 10 East, 555, 563.
(7) (1863) 14 C. B. (N.S.) 59.
(8) (1877) 3 App. Cas. 72.
(9) (1876) 1 Q. B. D. 377.
(10) (1885) 10 P. D. 103, 108.
(11) [1907] 1 K. B. 660.

deal with the question of the effect of the deviation upon the contract of affreightment before hearing the cross-appeal.]

Atkin, K.C., in reply.

[Reference was also made to *Gilroy* v. *Price* (1) ; *Stanton* v. *Richardson* (2); *Lyon* v. *Mells*. (3)]

Cur. adv. vult.

Dec. 20. FLETCHER MOULTON L.J. delivered the judgment of the COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) as follows: The critical question in this case relates to the rights of the owners of a ship as against the holders of bills of lading of the cargo in a case where an act has been done by the captain during the voyage which would otherwise have been in breach of the contract of affreightment, but which was justified by the fact that it was reasonably necessary at the time for the preservation of the vessel and cargo.

By well-established principles of English law certain acts of this kind (of which jettison of cargo and deviation are examples) are not only permitted but required to be done in proper cases. They are not only regarded as being no breach of the contract of affreightment, but are held in law to have been done by the master as agent for and on behalf of all interested in the venture, whether as owners of the ship or of the cargo, and give rights of general average contribution from all who thus derive benefit in order to compensate those who have suffered loss from the doing of the act. To enforce these rights the law gives a lien on the cargo which is enforceable by the master, who, in so enforcing it, acts as the agent of all those who are entitled to the contribution or indemnity for the loss which they have suffered. In ordinary cases the application of these principles is in conformity with our most fundamental ideas of justice, and the Courts do not hesitate to enforce them. But other considerations arise where the necessity is due to the default of the shipowner and he is the person who claims that

(1) [1893] A. C. 56.
(2) (1872) L. R. 7 C. P. 421; (1874) L. R. 9 C. P. 390.
(3) (1804) 5 East, 428.

C. A. 1910

KISH v. TAYLOR.

he should not suffer. It is a case of this kind which we have here to consider.

The vessel to which this action refers, the steamship *Wearside*, started on the voyage (which was from Pensacola to Dunkirk, Rotterdam, and Liverpool) in an unseaworthy condition by reason of an excessive quantity of cargo, which consisted of lumber, being piled on her deck reaching to a height of eighteen feet. Meeting with bad weather soon after starting, her deck cargo shifted, carrying away the lashings and tearing up some of the deck plates so that the water poured into the hold. This necessitated her putting into Halifax and effecting temporary repairs. The judge has found that this necessity was due to the unseaworthiness of the ship at the commencement of the voyage, and for this the plaintiffs as owners of the ship were alone responsible. The defendants are the owners of bills of lading for a portion of the cargo. For the purpose of the point now under consideration, it is conceded that the action is to enforce rights which are given to the plaintiffs by the bill of lading, but which would not arise from the ordinary common law contract of carriage by common carrier or bailment for the purpose of carriage. The defendants contend that by reason of the deviation the plaintiffs have disentitled themselves to enforce the special contract of affreightment, i.e., the contract evidenced by the bill of lading. Such, they say, would be the legal consequence of a deviation that was not reasonably necessary, and they contend that the rights of the plaintiffs where the necessity for the deviation is due to their own default are the same as if that had been the case. The question which we have to decide is therefore whether in a case where the necessity for a deviation arises from the default of the shipowner in sending the ship to sea in an unseaworthy state he can claim to be in a different position from that in which he would have been had the deviation itself been unnecessary.

The legal consequences of a deviation in fact from the ordinary course of the voyage specified in the bill of lading are not disputed. If it is reasonably necessary for the safety of the ship or cargo or for saving human life it is, of course, no breach of the contract of affreightment whether that contract be a special contract, such as is evidenced by bills of lading, or

whether it is that which is implied from bailment for the purpose of carriage. But otherwise (as decided by this Court in the case of *Balian* v. *Joly Victoria & Co.* (1), and more recently in the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (2)) it does away with the special contract of affreightment altogether. The shipowner by his own default has substituted a different voyage from that to which the special contract (whether it be a contract of insurance or a special contract of affreightment) refers, and he cannot claim that contractual exceptions or obligations that relate to the one should be deemed to be transferred to the other. It follows, therefore, that if in the present case the shipowner cannot, as between himself and the holders of the bills of lading, set up that the deviation in fact which undoubtedly occurred when the ship put into Halifax was a deviation justified by necessity, he cannot enforce the rights in question against the holders of the bills of lading. These rights come to him solely through the bills of lading, and they stand or fall with his right to enforce that special contract of affreightment.

The position of the owners of the ship in the analogous case of jettison of goods forms the subject of a very important judgment of the Privy Council in the case of *Strang, Steel & Co.* v. *A. Scott & Co.* (3) In that case the master of the ship jettisoned some goods in order to save the ship. It was admitted that the act was reasonably necessary for the safety of the ship, but it was proved that the danger in which the ship lay was due to his own negligence. When the ship came to port he claimed a lien on the goods constituting the cargo for a contribution to general average in respect of the loss of the goods jettisoned. The owners of the goods on which the lien was asserted insisted that no such right of lien existed by reason of the fact that the danger which justified the jettison was brought about by the negligence of the master himself for which the shipowners were liable. The Court laid down that, the sacrifice of the goods being for the general safety, the right of the owners of the jettisoned goods to be indemnified by the owners of the goods saved was unaffected

(1) (1890) 6 Times L. R. 345. (2) [1907] 1 K. B. 660.
(3) 14 App. Cas. 601.

C. A. 1910

KISH v. TAYLOR.

by the fact that the danger was due to the master's negligence. These owners were not responsible for that default and remained in the position of innocent owners whose goods had been sacrificed for the common safety. But they also laid down that the case was different where the shipowner was making a claim in his own interest, as, for instance, when he was asserting a lien or bringing an action on his own behalf. In such a case he could not be permitted to set up a right due to his own default, and, therefore, he was not protected from the consequences of the jettison, or entitled to any indemnity in respect of it, because he could not be allowed to claim privileges which arose from his action being justifiable under the circumstances where the circumstances which justified it were brought about by his own failure to perform his own obligations.

The right and even the duty of deviation in cases of necessity are as well established as they are in the case of jettison. They rest on like grounds, and in my opinion there can be no reasonable doubt that the case of *Strang, Steel & Co.* v. *A. Scott & Co.* (1) is an authority for saying that in case of a deviation which is necessitated by the wrongful act of the shipowner or his representative, the master, the shipowner would be entitled to no indemnity against the consequences, nor would he be able to protect himself from any damages or contribution to which other parties would have been entitled had the deviation been without reasonable cause. This is indeed conceded in principle by the respondents in the present case. They admit that all the costs of going to an intermediary port (which in ordinary cases would be a matter of general average) must be borne by them because the deviation was rendered necessary by the initial unseaworthiness of the ship. But they contend that, although this is so, they are not prejudiced in respect of the special contract of affreightment evidenced by the bills of lading, and that in litigation thereon it is open to them to allege that the deviation was a necessary one, even though the necessity was due to their own default.

In deciding this question, we think it right to examine very carefully the precise grounds on which the Lords of the Privy

(1) 14 App. Cas. 601.

Council based their judgment in the case of *Strang, Steel & Co.* v. *A. Scott & Co.* (1), for although that decision is not technically binding on this Court, yet, short of being absolutely binding upon us, it is difficult to conceive of a judgment that ought to carry greater weight with us on account of the authority both of the tribunal and of the individual members who took part in the decision. It carries additional weight because it is evident from the tenor of the judgment that their Lordships realized that the case raised fundamental questions of shipping law of a novel and important character, and that it was desirable to base their decision on consistent principles of general applicability, and not on any special or peculiar facts in that particular case.

Lord Watson, in delivering the judgment of the tribunal, says as follows: "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save."

The tribunal, therefore, was of opinion that where the necessity for the act arose from his own default the shipowner was personally disentitled to appeal to the necessity of the act in order to shelter himself from its contractual consequences. It is true that in that case the contractual consequences which the tribunal were considering related to rights of contribution arising out of implied contracts, but the reasoning on which the judgment depends affords no ground for the suggestion that it applies only to that particular case. It goes much deeper. It is evident that the tribunal regarded it as another example of

(1) 14 App. Cas. 601.

C. A. 1910

KISH v. TAYLOR.

the principle that a man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity. With this we entirely agree; and in applying it no distinction can be drawn between one contract of affreightment and another or between one contractual consequence and another. The rights of the parties are the same as though the act were not justified by the circumstances, because the circumstances which in fact justified it were brought about by the party's own default.

The application of this principle to the facts of the present case presents no difficulty. The plaintiffs, the shipowners, make a claim on the cargo owners for certain sums alleged to be due to them as dead freight under the bills of lading. The defendants, the cargo owners, answer that the shipowners cannot rely on the conditions of the bills of lading because the ship deviated from her voyage by putting into Halifax. To this the plaintiffs reply that the deviation was justifiable as being reasonably necessary for the safety of the ship and cargo. To this the cargo owners rejoin that the necessity resulted from the default of the shipowners in sending their ship to sea in an unseaworthy condition. It is conceded that this rejoinder is true in fact and we hold it to be good in law, and it follows, therefore, that the plaintiffs fail in their action.

In the able argument which was addressed to us on behalf of the plaintiffs much reliance was placed on the contention that there had been no deviation because the putting into Halifax was reasonably necessary, and various references were given to passages in text-books where the word "deviation" is used in the sense of unjustifiable deviation. We are of opinion that there is no substance in this contention. Deviation is a question of fact. Its justifiability is a mixed question of fact and law, the issue so far as it is one of fact being an entirely distinct one. One has only to look at s. 49 of the Marine Insurance Act, 1906, to see that this is the true interpretation which is to be attached to the word "deviation." A consideration of the onus of proof shews that it must be so. If a ship chartered for a direct voyage from New York to Plymouth puts in at Lisbon, which, of course, is not on its road, the cargo owners could allege a

deviation and prove it from those facts. The onus of justifying it would rest on the shipowners, who would successfully defend themselves by shewing that although it was a deviation in fact it was necessitated by circumstances.

A strong appeal was also made to us based on the alleged widespread consequences of a decision against the shipowners in this case, and the suggested injustice of depriving them of the benefit of the conditions of the bill of lading in respect of a deviation which was in fact necessary. We doubt whether the number of cases in which necessity of a deviation is the direct consequence of initial unseaworthiness is large, but the question whether it be large or small does not, in our opinion, affect the justice of our decision. No more striking case could be given than that which we have before us. It is conceded that if the plaintiffs had voluntarily put into Halifax they could not sustain their claim against the defendants. What they did in fact was to start with their ship so overladen that the occurrence of unsettled weather (the possibility of which might reasonably be anticipated) would certainly necessitate their so doing. If they were, under such circumstances, allowed to plead in their own favour the necessity of their act, we fail to see how a different decision could be given in a case where they had started with only enough coal to permit their getting to the intermediate port. In such a case the going to the intermediate port would be a necessary act for which the necessity would be due to the initial unseaworthiness. We fail to see the justice of permitting a shipowner to substitute by his own default a different voyage for that to which the exceptions in the bill of lading relate and yet hold the owners of the cargo bound by the conditions and exceptions thereof. The necessity, whether moral or physical, of making the deviation, which the plaintiffs' counsel regarded as making in favour of his clients' case, appears to us only to strengthen the contention that the original breach was the direct and proximate cause of the change of voyage.

Inasmuch as our decision on this point goes to the root of the action we have not dealt in any way with the other important points which were argued before us on the one side or the other. It is, of course, open to the parties to raise any of them should

C. A. 1910

KISH v. TAYLOR.

the case go higher and the tribunal come to a different conclusion from us upon the point on which alone we have decided this case.

The judgment of the Court is, therefore, that the appeal be allowed and the action dismissed with costs both here and below, and it necessarily follows that the cross-appeal of the plaintiffs is dismissed with costs.

Appeal allowed. Cross-appeal dismissed.

Solicitors for appellants: *Trinder, Capron & Co.*
Solicitors for respondents: *Botterell & Roche.*

H. B. H.

1910
Dec. 8, 9.

HOLLOWAY *v.* CROW.

Education—Schools—Non-attendance of Child—Breach of By-laws—Reasonable Excuse—Beneficial Employment of Child—Onus of Proof—Function of Local Education Authority—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.

By-laws were made by a local education authority under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, by one of which it was provided that "The parent of every child of not less than five nor more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance."

By another by-law it was provided that "A child between thirteen and fourteen years of age shown to the satisfaction of the local authority to be beneficially employed shall not be required to attend school" if certain other conditions were complied with.

By the direction of the local education authority a complaint was preferred before justices against a parent for unlawfully committing a breach of the by-laws by not causing his daughter, a child between five and fourteen years of age, to attend school. Before the justices the parent stated in substance that he had kept the girl, who had attained the age of thirteen years and a half, at home owing to sickness in his family in order that she might help in nursing. The justices dismissed the complaint upon the ground that the prosecution had not proved that the child was not beneficially employed, and that if she were employed in nursing the sick it was beneficial employment. On appeal to a Divisional Court:—

Held, that the decision of the justices was wrong upon the grounds (1.) that the onus was on the parent of proving affirmatively that the

child was beneficially employed, and (2.) that under the by-laws the education authority and not the justices were the judges of whether a particular occupation was or was not a beneficial employment, and that in giving their decision upon that point the justices had usurped the function of the education authority.

CASE stated by justices for the county of Huntingdon.

A complaint was preferred by the appellant Holloway, a school attendance officer, against the respondent Crow, under school attendance by-laws made by the Education Committee of the Council of the Administrative County of Huntingdon under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, and sanctioned by the Board of Education on February 16, 1904 (1), for that the respondent, in the area of the local education authority, on June 3, 1910, being the parent of Florence Crow, a child of the age of thirteen years, residing within the said area, unlawfully committed a breach of the by-laws, that is to say, that the respondent unlawfully did not cause the child to attend school every time the school was open.

The by-laws (so far as material) were as follows:—

"CHILDREN TO ATTEND SCHOOL.

"2. The parent of every child of not less than five nor more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance.

(1) Elementary Education Act, 1870, s. 74: "Every school board may . . . . with the approval of the Education Department make by-laws for all or any of the following purposes: (1.) requiring the parents of children" not less than five nor more than thirteen years of age "to cause such children . . . . to attend school . . . . It shall be lawful for Her Majesty, by Order in Council, to sanction the said by-laws, and thereupon the same shall have effect as if they were enacted in this Act."

By the Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2, sub-s. 1, the Education Department was replaced by the Board of Education.

By the Elementary Education Act, 1900 (63 & 64 Vict. c. 53), s. 6, sub-s. 1, the age of thirteen years mentioned in s. 74 of the Elementary Education Act, 1870, with reference to by-laws was replaced by fourteen years, and by sub-s. 3 the sanction of the Board of Education to by-laws made under s. 74 of the Act of 1870 was substituted for the sanction of Her Majesty in Council.

By the Education Act, 1902 (2 Edw. 7, c. 42), s. 5, school boards were abolished and their powers and duties transferred to education authorities.

1910

HOLLOWAY v. CROW.

"REASONABLE EXCUSES.

"Any of the following reasons shall be a reasonable excuse, namely:—

"(*a*) That the child is under efficient instruction in some other manner.

"(*b*) That the child has been prevented from attending school by sickness or any unavoidable cause.

"(*c*) That there is no public elementary school open which the child can attend within three miles, in the case of a child over seven years of age, and one mile in the case of a child under seven years of age measured according to the nearest road from the residence of such child."

"PROVISO AS TO TOTAL EXEMPTION.

"5. And provided always that:—

. . . . .

"(*b*) A child between thirteen and fourteen years of age shown to the satisfaction of the local authority to be beneficially employed shall not be required to attend school if such child has obtained a certificate that it has made 350 attendances after five years of age in not more than two schools during each year for five years whether consecutive or not."

At the hearing of the complaint it was proved that two members of the local education committee in writing directed the prosecution.

The child on June 3, 1910, was thirteen years and six months old and was absent from school from April 23, 1910, to June 3, 1910, inclusive, during which time she might have attended fifty-five times.

The appellant had made a report to the local school attendance committee to the effect that the respondent had been "personally cautioned by the sub-committee . . . . either to send the child to school or to find her employment," and that "if not, he was to be prosecuted, and that the respondent had written to the appellant saying 'I shall not send my girl to school,'" and that the child had only been beneficially employed for less than a week.

1910

HOLLOWAY v. CROW.

Before the justices the respondent in answer to the charge said in effect that he had kept the girl at home owing to sickness in his family in order that she might help in nursing.

The justices held that the prosecution had not sufficiently proved that the girl was not beneficially employed, and that if she were employed in nursing the sick she was beneficially employed. They therefore dismissed the complaint.

J. Brooke Little, for the appellant. The decision of the education committee as to whether the child was or was not beneficially employed is conclusive and cannot be questioned before the justices. By-law 5 (*b*) deals specially with the absence of the child on the ground of beneficial employment. It is true that other matters than those mentioned in by-law 2 may constitute a reasonable excuse for the child's non-attendance: *Belper School Attendance Committee* v. *Bailey* (1); *Rex* v. *West Riding of Yorkshire Justices, Ex parte Broadbent.* (2) But as regards absence on the ground of beneficial employment the by-law is a special one and the discretion of the education committee as to whether the particular employment of the child constitutes a reasonable excuse for absence is absolute. If the reasonable excuse set up is that the child was beneficially employed, the beneficial employment must be made out to the satisfaction of the education authority.

The respondent did not appear.

LORD ALVERSTONE C.J. It is unfortunate that the respondent is unrepresented. He was summoned for committing a breach of by-law 2, which required him to send his child to school unless there was a reasonable excuse for not doing so, and his defence was that the child was exempt under by-law 5 (*b*), which confers exemption where the child is beneficially employed. The beneficial employment is to be shewn to the satisfaction of the local education authority, and the position would have been clearer if there had been some direction as to how that satisfaction is to be indicated, by document or otherwise. The justices dismissed the summons upon the grounds (1.) that in their view

(1) (1882) 9 Q. B. D. 259. (2) [1910] 2 K. B. 192.

1910

HOLLOWAY v. CROW.

Lord Alverstone C.J.

the prosecution had not proved that the child was not in beneficial employment, and (2.) that they considered that nursing the sick was a form of beneficial employment. In my judgment the justices were wrong on both points. The burden of proof was not on the prosecution to shew that the child was not beneficially employed; the by-law directs that the beneficial employment must be shewn to the satisfaction of the education authority. The onus of proving beneficial employment is therefore on the parent. With regard to the decision of the justices that nursing was a beneficial employment, in my judgment they were not intended to be the judges of whether a particular occupation was or was not a beneficial employment, and in giving that decision they usurped the function of the education authority. The case must therefore go back to them for further consideration. We cannot say that it must go back with a direction to convict, for the justices may find that on the day in question there was a reasonable excuse for the child's non-attendance quite apart from any question whether the child was beneficially employed; but they will not be entitled to say generally that nursing is a reasonable excuse. They must not under cover of finding a reasonable excuse reverse the decision of the local education authority that the child had not been shewn to their satisfaction to be beneficially employed.

PICKFORD J. I agree.

AVORY J. I am of the same opinion.

Case remitted.

Solicitors for appellant: *Peacock & Goddard, for J. P. Maule, Huntingdon.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1911
Jan. 20.

In re ROGERS.

Bankruptcy—Judgment Debtor—Execution—Seizure by Sheriff—Claimant—Interpleader—Sale by Sheriff—Bankruptcy of Judgment Debtor—Costs of Execution—Sheriff's Costs of Interpleader—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 119.

Goods of a judgment debtor which had been seized by the sheriff under a writ of fi. fa. were claimed by a bill of sale holder and the sheriff interpleaded. On the hearing of the interpleader summons the claim was admitted and an order was made for the sale of the goods and for payment out of the proceeds of the claim of the bill of sale holder, the amount of the execution, and the costs of all parties, including the costs and charges of the sheriff. Before the sale, notice was served on the sheriff that a receiving order had been made against the judgment debtor:—

Held, that the sheriff's costs of the interpleader were not "costs of the execution" within s. 11 of the Bankruptcy Act, 1890, and consequently were not payable out of the debtor's estate.

Decision of Phillimore J., ante, p. 104, reversed on this point.

APPEAL from a decision of Phillimore J.(1)

The facts are fully stated in the report of the case before the learned judge.

The following summary of the facts is sufficient for the purposes of the present report.

On January 1, 1910, the sheriff seized goods of the debtor under three writs of fi. fa. issued by three judgment creditors of the debtor. The goods were claimed by a bill of sale holder, but the claim was disputed by the judgment creditors, and thereupon the sheriff issued an interpleader summons. At the hearing of the interpleader summons on January 10, 1910, the claim of the bill of sale holder was admitted and an order was made in each action in the following terms:—"It is ordered that the above named sheriff proceed to sell enough of the goods seized under the writ of fi. fa. issued in this action to satisfy the expenses of the sale, the rent (if any) due, the claim of the claimant, and this execution. And it is further ordered that out of the proceeds of the said sale (after deducting the expenses and

(1) Ante, p. 104.

C. A. 1911

ROGERS, *In re.*

rent, if any) the said sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant. And it is further ordered that no action be brought against the said sheriff, and that the costs and charges of the sheriff, the plaintiff's costs of this application, and the claimant's fixed costs of 1*l.* 1*s.* be paid out of the proceeds of the said sale."

The interpleader summons was not served on the debtor and he was not a party to this order.

The sale was advertised for January 19, 20, and 21, but in the meantime a receiving order was made against the debtor, of which notice was at once given to the sheriff. The official receiver allowed the sale to proceed on January 19 and 20, but on the morning of January 21 served the sheriff with the usual notice, claiming the goods or the proceeds of sale under s. 11 of the Bankruptcy Act, 1890. The proceeds of the two days' sale were more than sufficient to pay the amounts and costs directed by the order of January 10, and the sheriff, upon the taxation of his costs and charges under this order, was allowed the sums paid to the bill of sale holder and the auctioneers, and the judgment creditors' cost of the interpleader (8*l.* 18*s.* 8*d.*) and the sheriff's costs of the interpleader (11*l.* 18*s.*). Subsequently the official receiver required the sheriff's costs and charges to be taxed under r. 119 of the Bankruptcy Rules, 1886 and 1890, by the bankruptcy taxing Master, who disallowed the items of 11*l.* 18*s.* and 8*l.* 18*s.* 8*d.* on the ground that they were not "costs of the execution" within s. 11 of the Bankruptcy Act, 1890.

Upon an application to review the taxation of the bankruptcy taxing Master, Phillimore J. held that the sheriff's costs of the interpleader summons were costs of the execution within s. 11 of the Bankruptcy Act, 1890, but that the execution creditor's costs of the interpleader summons were not.

The official receiver appealed from the first part of this decision.

Sir John Simon, S.-G., and *Hansell*, for the appellant. The scheme of s. 11 of the Bankruptcy Act, 1890, is that the sheriff must hand over to the official receiver what he has received

under the execution whether in specie or in money, but that he is to be allowed the costs of the execution, and rr. 118 and 119 of the Bankruptcy Rules, 1886 and 1890, provide for the taxation of those costs. The question is, what are the costs of the execution? The sheriff's costs of the interpleader summons are in no sense costs of the execution. Neither the debtor nor his estate was represented on the interpleader summons.

[FLETCHER MOULTON L.J. referred to Archbold's Queen's Bench Practice, 12th ed., p. 1406.]

The interpleader summons was taken out for the protection of the sheriff, and the question at issue is not affected by the order of January 10, which purports to give costs against a party who was not present. It may be said that if there had been no execution these costs would not have been incurred, but that is not a ground for saying that they are costs of the execution. The appellant's contention is not that the sheriff ought not to be paid his costs of the interpleader summons by the proper party, but that he ought not to be paid out of the debtor's estate. The general rule as to the sheriff's costs on an interpleader summons is laid down by Field J. in *Searle* v. *Matthews* (1), approved in *Goodman* v. *Blake*. (2) The cases referred to in the judgment of Phillimore J. have no bearing on the point at issue; they are all cases as to possession money.

Frank Mellor, for the respondent. The sheriff's costs of the interpleader in this case were properly included in the costs of the execution. Here the official receiver has expressly authorized the sale of the goods by the sheriff up to the point at which more than sufficient had been realized to satisfy the claim of the bill of sale holder. The effect of the sale was to get rid of a valid charge affecting the whole of the estate, and the official receiver was thus enabled to deal with the estate freed from that charge. Except for the interpleader proceedings the estate could not have been realized for the official receiver, and the official receiver having taken the benefit of the sale ought to pay the costs of the proceedings which brought about the sale. The sheriff was not bound to interplead, he might have

(1) (1883) 19 Q. B. D. 77, n. (2) (1887) 19 Q. B. D. 77.

C. A. 1911

ROGERS, *In re.*

withdrawn: *Scarlett* v. *Hanson.* (1) The official receiver would have been very materially hampered in realizing the estate if he had nothing to dispose of but an equity of redemption.

Counsel also referred to the Rules of the Supreme Court, Order LVII., rr. 12, 15, and to *Stern* v. *Tegner.* (2)

COZENS-HARDY M.R. This is an appeal from the decision of Phillimore J. dealing in this particular case with a comparatively small sum, but raising undoubtedly a question of some interest and importance in bankruptcy law. It is an exceedingly short and, but for the judgment of Phillimore J., I should have thought an exceedingly simple, point. By the Bankruptcy Act, 1890, s. 11, there is a statutory provision dealing with the position and rights of the sheriff where the goods of the bankrupt have been taken in execution. It is in two parts, but, as I read it, the two parts for the purposes of the question which we have to consider to-day are really identical. The first part of s. 11 deals with the case where goods have been taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made, and it provides that the sheriff shall on request deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but that the costs of the execution shall be a first charge on the goods. The second part contemplates the same event except that the goods have been sold or money has been paid to prevent a sale, and then the provision is that "the sheriff shall deduct his costs of the execution from the proceeds of sale." I think that the effect of that is that by this statutory provision the costs of the sheriff, "his costs of the execution," are in that particular case made payable out of the bankrupt's estate if the official receiver claims either the goods or the money, the proceeds of the goods, but unless and until the sheriff's claim can be brought within the meaning of those words "costs of the execution" I fail to see any ground for the contention that the bankrupt's estate ought to be made liable for the costs of proceedings initiated by the sheriff, and, I

(1) (1883) 12 Q. B. D. 213. (2) [1898] 1 Q. B. 37.

assume, properly initiated by the sheriff, against claimants under a bill of sale, or mortgage, or what not, before the bankruptcy or, whether before the bankruptcy or not, before the sale. Now in the present case there were three executions put in. Then there was a claimant who claimed to have a bill of sale over the goods. The sheriff then most properly interpleaded, and an order was made, which I think can only have been a consent order because it is in these terms, or rather there were three orders in the same form. [The Master of the Rolls read the order set out in the statement of facts.] That was an order made in the interpleader proceedings, to which neither the debtor nor the official receiver nor anybody representing the estate was party, that out of the goods which belonged to the bankrupt's trustee, in the events which had happened, certain costs should be paid. Now we have nothing to do with any right which a bill of sale holder or a mortgagee who establishes his title may have to add his own costs in proceedings of that nature to his security. Nothing that I say has any reference to that. I put that aside, but what happened was this. The official receiver said "You must have these costs of execution taxed by the bankruptcy taxing Master." It was then said by the sheriff, "My costs have been taxed by the Master in the King's Bench Division, and here is his allocatur, and he has allowed me 11*l.* 18*s.*, being my costs of the interpleader summons." I should say this has nothing to do with the costs of the sale, but we are dealing here simply with the costs of the interpleader proceedings. The sole point is this: Are these "costs of the execution"? It seems to me absurd to say that they are. They are costs of proceedings which are initiated by the sheriff and costs which were incurred after the execution had been effected, but before the sale. They are not costs of the execution. Then are they costs incidental to the execution, even if that had been sufficient to entitle the taxing Master to allow them? In my opinion this is not a case in which the sheriff says "If I do not get these costs from the bankrupt's estate I shall not get them at all." There are authorities and there are principles, I think, upon which an unsuccessful litigant can be made to pay the costs of the sheriff, whether the unsuccessful litigant be the

C. A. 1911

ROGERS, *In re.*

Cozens-Hardy M.R.

bill of sale holder, or whether he be the execution creditor. We have nothing to do with that. All we have to see is whether under the statutory provision contained in s. 11 of the Act of 1890, under which alone the sheriff can claim these costs, his costs of the interpleader issue are costs of the execution, and in my opinion they are not. With great respect to Phillimore J.'s judgment I think that this appeal should be allowed.

I only wish to add this. I am unable to follow what is said in that judgment about the costs of the auctioneers. Of course in considering the allowance for the costs of the sale it is obvious that what the auctioneers have charged and been paid is a matter which will have to be taken into consideration. In my opinion this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion, and as it is a matter of some importance I propose to state the grounds of my decision. In this case three executions were put in, and the three execution creditors delivered the writs to the same sheriff. He proceeded to seize certain goods which he believed to be those of the execution debtor. A claim was made to these goods, and in order to protect himself the sheriff, under the statutory provision in that regard, interpleaded. This interpleader summons, which is before us, was not served, and naturally was not served, upon the execution debtor. He was not a party to it. Upon that interpleader summons an order was made which could only have been made per incuriam. It was an order obviously in the interest of both the parties to the summons and of the sheriff; but in certain material respects it was in their interest at the expense of an absent party who was in no way concerned in the proceedings. I need not deal with the order except so far as it relates to costs. It directed that the costs of all parties should come out of the pocket of the execution debtor, who was not a party to the proceedings. Now there could be no jurisdiction to give costs against an absent party in that way. In an interpleader summons if a claimant is unsuccessful he may very well, under modern practice, (though it was not so under the old practice,) be ordered to pay the sheriff's costs of the interpleader, and

similarly if the claimant succeeds the execution creditor may very well be directed to pay the sheriff's costs of the interpleader. But I cannot understand how those costs can be put on an absent person who was not in any way responsible for the claim being made, and was not a party to the proceedings, or represented before the tribunal that was making the order as to costs. But that order was made, and now the sheriff claims that he is entitled to the benefit of it and to add these costs of interpleading to the possession money and poundage and other costs of the execution, and to recover them under the section of the Bankruptcy Act, 1890, which says that he may under circumstances such as the present (the details of which I need not go through as they have been so accurately stated by the Master of the Rolls) deduct his "costs of the execution" from the proceeds of sale. Now it appears to me, first, that it is impossible that the words "costs of the execution" can include costs which were thus wrongly and without jurisdiction given to him on the interpleader summons. But quite apart from whether the order on that summons was, or was not, rightly made, in what sense can these be called "costs of the execution"? They were the costs of a summons which the sheriff took out in his own defence in order to prevent his having to make choice between the validity of the claim of the execution creditor and that of the claimant against the execution debtor. Upon no reasonable interpretation of the words "costs of the execution" can the costs of a proceeding of that kind be held to come within the words, and, therefore, in my opinion the learned judge was wrong in deducting these costs from the proceeds of sale and the decision of the taxing Master in bankruptcy was right. This appeal must, therefore, be allowed.

BUCKLEY L.J. The appellant, in my judgment, is entitled to our order. Counsel for the respondent has argued, and I think it has been the substance of his argument, that the estate has had the benefit of something and that the estate ought to bear the costs of it. As regards the costs of realization this is true, but those have been allowed and no question arises with regard to them. I cannot see that any other benefit arose to the estate

C. A. 1911

ROGERS, *In re.*

Buckley L.J.

from these interpleader proceedings. The validity or invalidity of the bill of sale could not in the interpleader proceedings have been determined, and, of course, was not determined, as between the bill of sale holder and the estate. The costs of the interpleader proceedings were incurred only for the protection of the sheriff. Non constat that the debtor would have ever raised any question of the validity at all. Why should the costs determining validity between the bill of sale holder and the execution creditor be borne by the debtor's estate? The question is whether the costs of interpleader proceedings are, within s. 11 of the Bankruptcy Act, 1890, "costs of the execution." In my opinion they are not. If the decision under appeal were right it would follow that, if a claim were made which failed, the sheriff's costs of the interpleader ought nevertheless to be borne by the debtor's estate. If the sheriff takes them out of the goods or their proceeds, how is the estate to obtain recoupment from the unsuccessful claimant? It appears to me that these are not costs of the execution at all, and although the sheriff is no doubt entitled to them as against the proper party, I cannot conceive that the proper party is the debtor's estate.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitors for respondent: *Palmer & Bull.*

H. B. H.

COAKER *v.* WILLCOCKS.

1910
Dec. 7.

Common—Dartmoor Forest—Newtake—Duty to fence—Sheep Damage Feasant—Impounding—Pound more than Three Miles distant—1 & 2 Ph. & M. c. 12, s. 1.

The defendant was the occupier of a newtake formerly part of the Forest of Dartmoor, and was bound to fence his land against moorland cattle, including sheep :—

Held, that he was not bound to fence against sheep of a peculiarly wandering and active disposition.

Principle of *Child* v. *Hearn*, (1874) L. R. 9 Ex. 176, followed.

By s. 1 of the statute 1 & 2 Ph. & M. c. 12 it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is taken, except it be to a pound overt within the said shire not above three miles distant from the place where the distress is taken :—

Held, that the words "not above three miles" &c. do not qualify the distrainor's right to drive the distress to any pound within the hundred, rape, &c.

Opinion of the Serjeants in *Berdsley* v. *Pilkington*, (1588) Goulds-borough, 100, affirmed.

Appeal from the county court of Devonshire holden at Tavistock.

The plaintiff was entitled to and in the enjoyment of rights of common, including the right to turn sheep and other commonable beasts, upon land which was part of the Forest of Dartmoor.

The defendant was the occupier of a newtake or farm which had been enclosed from land forming part of the same forest. For the purposes of this case it was not disputed that the defendant as occupier of the newtake was bound to fence his holding against moorland cattle, including sheep.

The plaintiff brought this action to recover damages against the defendant for unlawfully seizing and impounding forty-two sheep of the plaintiff. The defendant alleged that the sheep in question were trespassing upon his newtake, and that he had distrained them damage feasant, as he lawfully might. The plaintiff alleged that the sheep had escaped from the moor on to the defendant's newtake by reason of the defendant having allowed his fences to be and remain in a defective condition.

1910

COAKER v. WILLCOCKS.

The plaintiff further claimed damages for an alleged breach of the statute 1 & 2 Ph. & M. c. 12, s. 1, by the defendant in driving the sheep to Dennabridge pound, which was more than three miles distant from the defendant's newtake.

The defendant counterclaimed for damages for trespass.

At the trial in the county court the facts in dispute between the parties were referred to Mr. Barrington, steward of the Duchy of Cornwall, a person having special information and knowledge concerning the matter in question, who made a report to the Court from which the following facts appeared :—

Early in the year 1904 one Lamb was the occupier of the defendant's newtake. Lamb kept a number of Scotch sheep. At the time of his occupation the fences of the newtake were dilapidated. On the death of Lamb his widow gave up the farm and sold the sheep, including some of the Scotch sheep, to the plaintiff, who turned them on to Dartmoor.

The fences of the defendant's newtake, about two miles and fifty-nine chains in length, were all rebuilt or restored between the spring of 1904 and the spring of 1906. Since the latter date it did not appear that any ordinary Dartmoor sheep had got over or through those fences. Neither the fences in question nor Dartmoor fences generally were constructed to keep out Scotch sheep, for which kind of sheep special fences are necessary.

On or before April 1, 1909, the date of the alleged trespass, the defendant's fences were in a reasonably fit and proper condition to fence out from the newtake moorland sheep; but they were not in a fit or proper condition to fence out Scotch sheep.

It was admitted that Dennabridge pound and the defendant's newtake where the sheep were taken were in the same hundred.

In these circumstances the county court judge gave judgment for the defendant on the claim and gave damages on the counterclaim for 40*s.*, the amount agreed upon between the parties in case of liability.

The plaintiff appealed.

Aggs, for the plaintiff. It is not disputed that the defendant is bound to fence his land against commonable cattle, including sheep. If through his failure to do this the cattle find their

way on to his land, he is the author of his own wrong and has no right to distrain them: *Carruthers* v. *Hollis* (1); *Singleton* v. *Williamson*. (2)

Secondly, even if these sheep were upon the defendant's land through the plaintiff's default so that they might be distrained damage feasant, still the impounding was wrongful. It was enacted by the Statute of Marlebridge, 52 Hen. 3, c. 4 (1267), and re-enacted by the statute 3 Edw. 1, c. 16 (1275), that persons should not cause any distress that they had taken to be driven out of the county where it was taken. Then by 1 & 2 Ph. & M. c. 12 (1554) it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is or shall be taken, "Excepte it bee to a Pownde overte within the said Shyre, not above three myles distante from the place where the said Distresse ys taken." In the opinion of the profession the meaning of this enactment is that the pound must be within the county and not more than three miles from the place in which the distress was taken: see Woodfall, Landlord and Tenant, 1st ed. (1822), p. 320; 18th ed. (1908), p. 547; Foà, Landlord and Tenant, 4th ed. (1907), p. 542; The Laws of England, vol. 1, p. 383. (3)

J. A. Hawke, for the defendant. The Forest of Dartmoor was originally a Royal forest. In the year 1239 it was granted to the Earl of Cornwall and thereupon became a free chase. In 1300 it reverted to the Crown, in whose possession it remained until 1336, when it became attached to the Duchy of Cornwall: Dartmoor Preservation Association Publications I., pp. xi. et seq. The obligation of the defendant, if any, is to fence his newtake against commonable cattle, including sheep. Sheep are not commonable cattle in a forest, and common for sheep cannot be acquired by prescription in a forest, though in a chase it may be so acquired: Manwood, Forest Laws, 4th ed. (1717), pp. 85, 86, 93. The right of the plaintiff to turn sheep on to the unenclosed land adjoining the defendant's land must have been acquired by grant, either actual or presumed; but that grant could never have conferred the right to depasture Scotch sheep,

(1) (1838) 8 Ad. & E. 113. (2) (1862) 5 L. T. (N.S.) 644.
(3) See also Co. Litt. 47 b.

1910

COAKER v. WILLCOCKS.

which made their first appearance upon the moor in the year 1904; the grant must have been confined to such as were known as moorland sheep in the neighbourhood at the time of the grant. The principle of *Child* v. *Hearn* (1) applies to the present case. There a railway company was under s. 68 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), bound to make and maintain sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway. In giving judgment in that case Bramwell B. said (2): "The company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it." And in the same case Pigott B. said (3): "I agree that the company are not bound to fence against animals of extraordinary capacities or under unusual conditions; but they must have a fence sufficient against ordinary cattle." The defendant in the present case was under no higher duty at common law than that which was imposed upon the railway company in the case cited. His obligation to fence is discharged if the fences are sufficient to keep out ordinary moorland sheep. If this were not the extent of the obligation it would follow that any commoner could, by introducing strange breeds of sheep of extraordinary agility, from time to time increase the burden of the occupiers of newtakes and of adjoining farmers without their consent. It may be that the plaintiff is doing no wrong in merely introducing Scotch sheep on to the moor; but if he does this he must keep those of them that are more than ordinarily wild off the land of neighbouring farmers. If he fails to do so he cannot complain if they are distrained damage feasant.

Secondly, the impounding was regular. The words of the enactment 1 & 2 Ph. & M. c. 12, s. 1, are unambiguous. The limit of three miles only applies if the cattle are driven out of the hundred, rape, wapentake, or lathe in which they were taken they may be driven to any pound within the hundred. There

(1) L. R. 9 Ex. 176. (2) L. R. 9 Ex. at p. 182.
(3) L. R. 9 Ex. at p. 183.

is authority for that view. In the case of *Berdsley* v. *Pilkington* (1) a distress was taken in the hundred of Offlay in Staffordshire. The report states that the city of Lichfield was originally within this hundred, but that by letters patent of 1 Mar. the city was made a county of itself. The party who took the distress impounded the beasts in a pound within the county of the city of Lichfield; and whether he had incurred the penalty of the statute (1 & 2 Ph. & M. c. 12), or no, was the question. The report continues thus: "Anderson. (2) The meaning of the statute was, because the bailiff of the hundred might make deliverence. Also I think it is within the compass of the statute because the city was a county severed before this statute made. And the Serjeants at the bar said that the party may drive the distress as far as he will within the same hundred, but he ought not to drive it above three miles without the hundred."

That case has never been overruled. The text-writers who read "not above three miles" as if the words were "nor above three miles" seem to have been misled by the passage in the first edition of Woodfall on Landlord and Tenant.

Aggs in reply.

DARLING J. In this case it appears that the defendant was the occupier of enclosed land which was originally part of the Forest of Dartmoor; when this land was enclosed, other land unenclosed was left outside its area. It has long been the custom to turn sheep out upon this unenclosed land.

Now ordinarily sheep are not commonable animals on forest lands; but by prescription they may become so; and on these lands sheep are and long have been commonable. For the purposes of this case the defendant is to be taken as bound to fence his land against commonable animals. In these circumstances Mr. Aggs has contended that the defendant is bound to fence his land against these sheep as being commonable animals. Mr. Hawke on the other hand asks us to confine commonable animals to such as are customary in the Forest of Dartmoor. I have come

(1) Gouldsborough, 100.

(2) Chief Justice of the Common Pleas, 1582—1605.

1910

COAKER v. WILLCOCKS.

Darling J

to the conclusion that this must be the true view. The plaintiff had the right to put sheep upon the unenclosed land, and the defendant was bound to fence his enclosed land against sheep; but that does not mean every kind and description of sheep. No doubt a sheep may be commonable although it comes from Scotland. I look at the matter by the light of Bramwell B.'s judgment in *Child* v. *Hearn* (1); that is to say in my view the disposition rather than the ancestry of the sheep is the material question. In that case Bramwell B. said (2): "Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it." The evidence in the present case proves that these Scotch sheep are of a peculiarly wandering and saltative disposition, straying and jumping in a way which distinguishes them from sheep which have hitherto been turned on to the unenclosed land, wandering as other sheep do not and jumping as other sheep cannot. In my judgment the defendant was not bound to fence his land from sheep of this description; it was the duty of the plaintiff, if he chose to own such sheep, to keep them from trespassing on the defendant's land; and as the plaintiff failed to do this, the defendant was entitled to distrain them damage feasant.

The next question is, How was the defendant to deal with the sheep? He was entitled to drive them to a pound, but not anywhere he might please. By the Act of 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is or shall be taken except it be to a pound overt within the said shire, not above three miles from the place where the said distress is taken. I understand that enactment as it was understood by the Serjeants at Bar as stated in the report of *Berdsley* v. *Pilkington* (3); the distress

(1) L. R. 9 Ex. 176. (2) L. R. 9 Ex. at p. 181.
(3) Gouldsborough, 100.

may be driven to any pound within the hundred, rape, wapentake, or lathe where it is taken; it matters not how far that pound may be from the place where the distress is taken; but if the party distraining chooses to take the distress to a pound outside the hundred, rape, wapentake, or lathe where it is taken, he may do so only if the pound is a pound overt in the same shire as that in which, and not more than three miles from the place where, the distress was taken. That is a very reasonable interpretation to give to this enactment. It was never the intention of the Act that the distrainor should lose his right to place the distress in the custody of the law if there should happen to be no pound overt within three miles from the place where he distrains. If it were not for the provision enabling him to drive the distress to a pound outside the hundred (provided it be a pound overt within the shire and not above three miles from the place where the distress was taken), he might have to drive it to a much greater distance within the hundred; the enactment is therefore in relief of the owner of the distress. This seems to have been misunderstood by text-writers who have read the words "not above three miles" as if they were "nor above three miles." It is high time that the effect should be restored to the statute which was attributed to it by the Serjeants in the time of Queen Elizabeth. For these reasons I think that this appeal should be dismissed.

BUCKNILL J. As to the second point I agree and have nothing to add. On the first point I also agree, but I should like to add a few words.

The action was brought by the plaintiff against the defendant for seizing and impounding forty-two sheep. A very reasonable course was taken at the trial whereby Mr. Barrington was chosen to make a report upon the facts. His report is terse and to the point and states that the defendant's fences were in a reasonably fit and proper condition to fence out moorland sheep, but were not in a fit and proper condition to fence out Scotch sheep. Now moorland sheep and Scotch sheep are not of the same class; the former are not so active as the latter; they are content to remain outside ordinary inclosures, while the latter are given to leaping or breaking into them. For

1910

COAKER v. WILLCOCKS.

Bucknill J.

the purposes of this action it is to be taken that the defendant was bound to fence his land against moorland cattle, including sheep. We have heard argument as to what cattle are commonable in a forest, but in this case we know that, however they became so, sheep are commonable upon the unenclosed land in question. But what sheep? Not all sheep, but such only as were moorland sheep on Dartmoor at the date of the inclosure of the defendant's newtake. There is no right by prescription or otherwise to turn Scotch sheep as such upon Dartmoor. These particular sheep were first brought on to the moor in the year 1904, and there is no evidence that Scotch sheep were ever introduced there before that date. It follows that the defendant was under no obligation to fence against Scotch sheep; they were not of the kind known as moorland sheep on Dartmoor at the date of the inclosure.

Then these sheep having leaped over or broken through the defendant's fences and trespassed upon his lands, he was entitled to distrain them damage feasant and bound to impound them lawfully. This he has done in my opinion. I have only to say that the words in the statute of 1 & 2 Ph. & M. c. 12, s. 1, are "not above three miles" and not "nor above three miles," and that there is no reason to suppose that they left the draftsman's hands in any other form.

Appeal dismissed.

Solicitor for appellant: *Henry Dobell, for J. P. Dobell, Plymouth.*

Solicitors for respondent: *Crowders & Vizard, for Windeatt, Totnes.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1911
Jan. 24.

MANCHESTER SHIP CANAL COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Rates—Reasonable Facilities—Agreed Through Rates—Application for Through Rates of same Amount but differently apportioned—Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 25.

Where there is an agreed through rate for through traffic over the lines of two railway companies and an agreed apportionment between the two companies which has not been cancelled, the Railway and Canal Commissioners have no jurisdiction to make a fresh apportionment of that agreed rate, or of one of the same amount, at the instance of one of the railway companies; the duty and power of apportionment being incidental only to the fixing of reasonable facilities for the conveyance of through traffic from one point to another.

Decision of the Railway and Canal Commissioners, [1910] 2 K. B. 913, affirmed.

APPEAL from a decision of the Railway and Canal Commissioners. (1)

By a letter of April 23, 1910, the Manchester Ship Canal Company proposed to the London and North Western Railway Company certain through rates and apportionments between Manchester Docks and the London and North Western stations.

By a letter of May 3, 1910, the London and North Western Railway Company objected to the proposed rates and to the apportionments thereof.

On May 25 application was made to the Railway and Canal Commissioners under s. 25 of the Railway and Canal Traffic Act, 1888, in the following terms:—

"The applicants state as follows:—

"1. They are a railway company within the meaning of the Railway and Canal Traffic Acts and the owners of railway lines and sidings which afford facilities for through communication between the Manchester Ship Canal and Manchester Docks and places in the United Kingdom including those referred to in the schedule hereto.

(1) [1910] 2 K. B. 913.

C. A. 1911

MANCHESTER SHIP CANAL COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

"2. The defendants are a railway company whose lines form the remaining part of the through routes for railway traffic between the Manchester Ship Canal and Manchester Docks and the said places.

"3. By letter dated 23rd April, 1910 (copy of which letter and the enclosures therein contained are set forth in the said schedule hereto), the applicants proposed to the defendants the through rates and the apportionments thereof as set forth in the said enclosures.

"4. By letter dated 3rd May, 1910 (copy of which is also set forth in the schedule hereto), the defendants objected to the proposed rates and to the apportionments thereof.

"The applicants apply to the Court of the Railway and Canal Commission under the above-mentioned Acts for:—

"1. An order allowing the said through rates and the apportionments thereof as set forth in the schedule to this application (being the through rates and apportionments proposed by the applicants in their said letter of 23rd April, 1910)."

The letter of April 23, 1910, referred to above and set out in the schedule to the application was as follows:—

"Through rates between Manchester Docks and London and North Western Stations.

"I beg on behalf of the Manchester Ship Canal Company to propose for the acceptance of your company through rates under the provisions of the Railway and Canal Traffic Acts for the forwarding of general merchandise traffic at class and exceptional rates between the Manchester Docks and the stations on the London and North Western Railway as set out in the schedule attached to this letter.

"The rates proposed are of the same amount as those set out in the rate-books of the Manchester Ship Canal Company and of the London and North Western Railway Company for traffic between the docks and the stations referred to. The details of the rates shewing the stations, amounts, routes, and apportionments proposed are fully set forth in the schedule hereto."

The schedule to the letter set out the names of a number of

stations on the London and North Western Railway and the amounts of the proposed rates for merchandise between Manchester Docks and each of the stations referred to, set out the proposed routes for the traffic from the Manchester Docks to the said stations of the London and North Western Railway Company, and stated the proposed apportionments of the said through rates as between the Manchester Ship Canal Company and the London and North Western Railway Company.

The letter of May 3, 1910, from the defendants referred to in the application and set out in the said schedule was as follows:—

"Through rates between Manchester Docks and London and North Western Stations.

"I have to acknowledge the receipt of your letter of the 23rd ultimo, proposing on behalf of the Manchester Ship Canal Company under the provisions of the Railway and Canal Traffic Acts certain rates with Manchester Docks. The existing through rates were agreed to by the London and North Western Company on the basis that that company and the Manchester Ship Canal Company should each receive certain amounts out of the rates. The effect of the present proposals of the Ship Canal Company would be to increase the amounts at present received by them, and to bring about a corresponding decrease in the amounts at present received by the London and North Western Company, and the proposed apportionment is inequitable and unfair having regard to the services rendered by the respective companies.

"Under these circumstances I have to object on behalf of the London and North Western Company to the proposed rates and the apportionment thereof."

The defendants before putting in any answer took out a summons for an order that all further proceedings in the application be stayed on the ground that the application and the schedules attached thereto disclosed no cause of action or grounds of proceedings against the defendants under the Railway and Canal Traffic Acts, or at all, or alternatively for an order that so much of the application and schedules as related

C. A. 1911

MANCHESTER SHIP CANAL COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

to the apportionment of the through rates referred to therein be struck out on the ground that the Railway and Canal Commissioners had no jurisdiction under the said Acts or otherwise to apportion the said rates under the circumstances set forth in the application.

The Commissioners came to the conclusion, on these documents, that they had no jurisdiction to entertain an application for the reapportionment of existing through rates, and allowed the objection and stayed all further proceedings under this application. The applicants appealed.

The appeal was heard on January 24, 1911.

Balfour Browne, K.C., *C. A. Russell*, K.C., and *Rowland Whitehead*, K.C., for the applicants. The present application fulfils the requirements of s. 25 of the Railway and Canal Traffic Act, 1888. The defendants have objected to the proposed through rates, and therefore the Commissioners must under sub-ss. 4 and 5 decide the matter, and in doing so they must determine the apportionment under sub-ss. 6, 7, and 8.

The amount of the proposed through rate is the same, but the fact that it is a different route makes it a new through rate for which apportionment is necessary.

[FLETCHER MOULTON L.J. There is nothing in your letter of April 23 to shew that the proposed routes are new.]

The routes are all set out in the schedule, and are new routes. The present rates are not "existing rates" for the purposes of apportionment. A through rate is made up of three things, an amount, route, and services; if there is an alteration in any one of these three constituents, it is not an agreed through rate; in the proposed through rates the route and the services are entirely different. The apportionment is not agreed upon and this must be determined by the Commissioners.

[COZENS-HARDY M.R. There is nothing on these documents to shew that any existing agreement was cancelled or threatened.]

Notice to determine the apportionment was given, but it was not considered advisable, as between the companies and the public, to disturb the enormous number of rates that were in existence the amount was therefore left the same, but the

conditions are entirely different, and the applicants have a right to ask the Commissioners to apportion that amount between the two companies. There is now no agreement as to the apportionment, and thus sub-s. 7 of s. 25 is applicable.

Sir Alfred Cripps, K.C., Lancelot Sanderson, K.C., and *Lynden Macassey*, for the defendants, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of the Railway Commissioners, which comes before us in a form which, so far as I am aware, is not common, though no doubt it is convenient. An application was made by the appellants for a through rate and an apportionment. The application itself embodies and includes two letters which are set out. The railway company, the respondents to the application, asked that the proceedings might be stayed on the ground that on the facts alleged in the application, in which I include the letters, there was no jurisdiction. The Commissioners were avowedly unwilling to decide this question on technical grounds, and they again and again offered the applicants an opportunity of giving evidence where any facts were in dispute. Therefore, if the application, according to its terms, did not raise the real question between the parties, it was in the view of the Commissioners—who after all are pre-eminently a practical body of business men—thought best that an opportunity should be given to the applicants to file affidavits, and to adduce evidence to shew that it was a case which ought not to be decided on what I may call the demurrer principle. That offer was deliberately refused, and the argument proceeded on the footing that the relations between the parties were those which the applicants on the summons, the railway company, alleged them to be. [His Lordship then read the application and the letter of April 23, and continued.] Now what does that mean? It means this: "The traffic in question is one which goes over only two lines; it is from our docks, partly over our railway, and then over yours. We do not propose any change in the rates, the rates are to be the same in amount as those set out." Mr. Balfour Browne argued that a change of route was proposed, but there is nothing in the letter to suggest that the rate was not to be the same rate in point of figures, if it was intended to

C. A. 1911

MANCHESTER SHIP CANAL COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

Cozens-Hardy M.R.

be a rate by a different route. That may or may not be the case. It does not appear in the letter or in the reply, which I will read. [His Lordship read it, and continued.] The Manchester Ship Canal Company were repeatedly invited by the Commissioners to shew that there was not an agreed rate and that there was not an agreed apportionment. They did not avail themselves of that opportunity. I think, therefore, we must treat this as an application by the Manchester Ship Canal Company as follows: "We ask you not to alter the existing through rate, but, the through rate standing, which we have agreed to, we ask you to alter the apportionment of that through rate as between us." With respect to an agreement for a through rate from one terminus to another, the line belonging to two companies, if the agreement is one made between those two companies for a through rate, it seems to me to involve necessarily that there was an agreement between those two companies as to the apportionment of the rate so agreed upon. The question, therefore, is shortly this: There is no proof that the agreement has in any way been cancelled, but the question whether there had been an agreement both as to through rates and as to apportionment was distinctly at issue, or distinctly challenged, before the Commissioners, and no evidence was filed. That being so, I think we should not be doing what is right if we did not deal with this case on the footing that there was an agreed through rate, and an agreed apportionment which had not been in any way cancelled between the parties, with the result that in my opinion there was no jurisdiction on the part of the Railway Commissioners to apportion these rates. There was no question that every facility for the passage of goods from the docks to these various stations had been given, there was no suggestion that the rate at which the North Western was carrying these goods was excessive, and I think the view taken by the Railway Commissioners on this point was quite right, that given a through rate, which is not challenged, there is no jurisdiction on the part of the Railway Commissioners simply to apportion that rate between the two railway companies; the duty and power of apportionment being only incidental to the giving of reasonable facilities for the conveyance of traffic from one point

to another. On both these grounds it seems to me that the view taken by the Railway Commissioners was quite right, and this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. It is clear that if an agreement is in existence between the parties as to the through rate, it is not for the Railway Commissioners to apportion it. The matter concerns only the parties and they have settled it by agreement, and the Court has no jurisdiction to interfere. On the other hand, it is not disputed that if any agreement that has existed has been terminated, so that no agreement exists between the parties, it is competent to the Manchester Ship Canal Company to make an application that a through rate shall be fixed and apportioned. The present application appears to me to avoid asking for a decision on the one matter which goes to the root of the jurisdiction. For if the whole of the sub-sections of s. 25 of the Railway and Canal Traffic Act of 1888 be examined, it will be found that the jurisdiction of the Commissioners to apportion is carefully limited so as to exclude cases where an agreement between the railway companies has been arrived at otherwise than by the application of the powers of the section. Sub-s. 6 says that where, upon the application of persons requiring traffic to be forwarded, a through rate is agreed to by the forwarding company or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners. That was relied upon by the applicants in this case as giving to the Commissioners a power of apportionment, but it is a power of apportionment only in a case where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to or made by order of the Commissioners. In other words it is clear that the statute gives the power of settling an apportionment only in cases where (whether by agreement or by order of the Commissioners) the through rate has been the result of an application that a through rate might be fixed. That seems to me specially to exclude the case where, entirely outside the Court or the powers of this section, the parties have agreed to a through rate and its

C. A. 1911

MANCHESTER SHIP CANAL COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

apportionment. There was never any intention that the Commissioners at the instance of one party to such an agreement should have any power to interfere with the apportionment of a through rate arrived at by contract.

BUCKLEY L.J. Before the Railway Commissioners, and again before this Court, certain statements of fact have been made at the Bar as to which the parties are not in accord. A. T. Lawrence J. gave an opportunity for evidence to be adduced as to these facts, and that was declined. I confess I have a difficulty in understanding why the appellants have come here. If the facts are as they allege, there unquestionably exists as between the appellants and the respondents a matter upon which appeal can be made to the Railway Commissioners to exercise their jurisdiction. Why, having been defeated below, they did not begin again, and issue a summons and adduce evidence upon their summons, I cannot understand. However, they have come here in the same state of things, and we have to see what is really the matter to be adjudicated upon. The Manchester Ship Canal Company have made an application, and have by their application referred to two letters. The only facts upon which we can adjudicate are the facts as appearing by that application and those letters, assuming for the present purpose that what is stated in those documents is true. This is not a demurrer, but it is a proceeding in the nature of a demurrer. Mr. Balfour Browne has endeavoured to say that although it appears prima facie by these documents that there was on the date when the application was made an existing agreement as to through rates, it was an existing agreement as to through rates by certain routes, and that the proposed through rates were through rates by other routes. If that is so there is a case to adjudicate upon. But there is nothing whatever to shew that it is so, and before the Railway Commissioners I think it is plain that Mr. Balfour Browne elected to proceed upon the footing and the hypothesis that it was not so, because I find from the print of the proceedings when speaking of the amount as being fixed he says "I am going to argue this case as if the amount were fixed," and not a word was said about there

being a variation of route, which of course was the material point if he was going to say that. He did not allege that there was any variation of route. Under those circumstances what he was inviting the Railway Commissioners to determine was this: assuming that there is an agreed rate—meaning a rate of so many shillings a ton—by a route—defining the route—is it a proper application to the Commissioners, maintaining that same rate, and that same route, to say how it should be apportioned? That is the whole matter upon which they have adjudicated. It seems to me an extraordinary contention, when the point alleged is that an agreed sum to be charged has been arrived at upon the footing that it be divided between the two contracting parties in a certain way, that it should be competent to come to the Railway Commissioners and say, maintaining the same amount to be charged, "please vary the proportion in which it shall be divided." The contract, if that be the state of facts, was an agreement that a certain amount should be charged upon the footing that it be divided in a particular way. If the method of division goes, the agreement as to amount goes, and there is nothing for the Railway Commissioners to decide. I regret this very much, as a good deal of money has been wasted in this case, because the parties have not come here with their facts and evidence in order. It may be, and I daresay it is, the fact that there is a question to be determined, but I am clearly of opinion that upon this application it is impossible to determine it if it exists, and that the Railway Commissioners arrived at the only proper method of dealing with it.

Appeal dismissed.

Solicitors: *Grundy, Kershaw, Samson & Co.; C. de J. Andrewes.*

W. C. D

Considered. LEAF v. INTERNATIONAL GALLERIES [1950] 2 K. B. 86

Disapproved. SOLLE v. BUTCHER [1950] 1 K. B. 674

Followed. EDLER v. AUERBACH. [1949] 2 All E.R. 692.

Criticised by DENNING, L.J. SOLLE v. BUTCHER. [1949] 2 All E.R. 1107.

Followed. EDLER v. AUERBACH [1950] 1 K. B. 359

1910

Dec. 9.

ANGEL *v.* JAY.

Landlord and Tenant—Lease — Executed Contract — Rescission — Innocent Misrepresentation—County Court — Equitable Jurisdiction — Cancelling Agreement for Lease—"Value of the property"—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 67.

A Court of Equity will not grant rescission of an executed lease on the ground of an innocent misrepresentation.

Legge v. *Croker*, (1811) 1 Ball & B. 506, followed.

By s. 67 of the County Courts Act, 1888, it is enacted that the county court shall have all the powers of the High Court in actions for (among other things) the cancelling of any agreement for the lease of any property where the value of the property shall not exceed the sum of 500*l.*

The plaintiff agreed to take and the defendant agreed to grant a lease of certain premises for a term of years. The value of the interest which the defendant agreed to grant to the plaintiff did not exceed the sum of 500*l.*; neither did the value of the defendant's whole interest in the premises exceed the sum of 500*l.*; the value of the freehold interest in the premises exceeded the sum of 500*l.*:—

Held, that the county court had no jurisdiction to order cancellation of the agreement.

Semble, that the words "the value of the property" in the above enactment mean the value of the fee simple.

APPEAL from the West London (Brompton) County Court.

The plaintiff brought an action for damages for an alleged breach of warranty that a certain house known as No. 37, Margaretta Terrace, Chelsea, was in sanitary condition. He also prayed cancellation of an agreement dated August 14, 1909, whereby he agreed to take and the defendant agreed to let the said premises for a term of years.

The value of the defendant's interest in the premises was less than 500*l.* The value of the interest which he agreed to confer upon the plaintiff was also less than 500*l.* The value of the freehold interest in the premises was more than 500*l.*

The defendant in the county court took the objection, under s. 67 of the County Courts Act, 1888 (51 & 52 Vict. c. 43) (1), that, as the value of the property was over 500*l.*, the county court had no jurisdiction to grant rescission of the agreement.

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67: "The Court shall have and exercise all the powers and authority of the High

1910

ANGEL v. JAY.

The county court judge held that the words "the value of the property" in s. 67 of the Act meant either the value of the defendant's interest in the property or the value of the interest which the defendant conferred on the plaintiff, but that, as each of these interests was less than 500*l.*, it was not necessary to choose between these two meanings. He therefore held that he had power to try the action.

The plaintiff proved that, during negotiations for a lease of the house in question, he had an interview with the defendant. There was a conflict of evidence as to what was said, but for the purpose of this appeal it was taken that the plaintiff asked if the house was in good sanitary repair and the drains in good condition, and that the defendant answered that the drains were good.

On August 14, 1909, the plaintiff and defendant entered into an agreement under seal which recited that the defendant agreed to let and that the plaintiff agreed to take the dwelling-house and premises with the appurtenances thereunto belonging, being No. 37, Margaretta Terrace, in the parish of St. Luke, Chelsea, in the county of Middlesex, with the use of the fixtures therein contained, to hold the same from August 28, 1909, for a term of three years thence next ensuing at the clear yearly rent or sum of 45*l.* payable monthly in equal payments of 3*l.* 15*s.* on the twenty-eighth day of each month in advance, the first payment to be due and payable on signing the agreement, free and clear of all deductions and abatements whatever. The plaintiff agreed to pay the rent on the days and in manner aforesaid, and also to pay all sewers rates and all other rates, taxes, and assessments whatsoever chargeable on the said premises or on the landlord in respect thereof as they should become due, landlord's property

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Court in the actions or matters hereinafter mentioned; (that is to say,) . . . .

(4.) "For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase-money, or in the case of a lease the value of the property, shall not exceed the sum of five hundred pounds."

1910

ANGEL v. JAY.

tax alone excepted; he also agreed to keep the house and premises and also all drains, pipes, taps, fixtures, and things belonging thereto in good repair and condition. He further agreed not to use the premises as therein mentioned, nor to assign or underlet them, but to yield them up at the expiration of the term in as good repair and condition as they were at the date of the agreement, reasonable wear excepted. The defendant reserved a right to enter the premises at reasonable times to view the condition thereof. There was a proviso for re-entry in case the rent was seven days in arrear and in certain other events, including non-performance of covenants by the plaintiff.

The plaintiff went into possession under this agreement, and remained in possession for about six months.

It was proved that the drains were in a defective state at the date of the execution of the agreement.

The county court judge held that what was said did not amount to a warranty as in *De Lassalle* v. *Guildford* (1), but only to a representation as in *Green* v. *Symons* (2); he held, therefore, that the plaintiff could not succeed in the action as upon a breach of warranty. But he held that what was said amounted to a representation that the house was in a sanitary condition; that the plaintiff agreed to take the house on the faith of that representation; and that the house was not in a sanitary condition when taken. On these findings he held that the plaintiff was entitled to equitable relief by way of rescission of the contract on the ground of innocent misrepresentation of a material fact. He therefore gave judgment for the plaintiff for a sum of 5*l.* 5*s.* paid by him under the contract and ordered the contract to be rescinded.

The defendant appealed.

Foà, for the appellant. The county court judge was wrong in ordering this lease to be rescinded. There is no jurisdiction in equity to rescind an executed contract on the ground of misrepresentation unless the misrepresentation is fraudulent: *Legge* v. *Croker* (3); *Wilde* v. *Gibson* (4), per Lord Campbell;

(1) [1901] 2 K. B. 215.
(2) (1897) 13 Times L. R. 301.
(3) 1 Ball & B. 506.
(4) (1848) 1 H. L. C. 605, at p. 632.

Brownlie v. *Campbell* (1), per Lord Selborne; *Soper* v. *Arnold* (2), per Cotton L.J.; *Seddon* v. *North Eastern Salt Co.* (3); *Hindle* v. *Brown.* (4) *May* v. *Platt* (5) is to the same effect. It is for this reason that contracts for the sale of real property often contain a clause providing for compensation in case of innocent misdescription: *Bos* v. *Helsham* (6); *Brett* v. *Clowser* (7); *Joliffe* v. *Baker.* (8)

Secondly, the county court had no jurisdiction in this case. By s. 67, sub-s. 4, of the County Courts Act, 1888, the Court only has jurisdiction in actions for the cancelling of an agreement for the sale, purchase, or lease of any property where in the case of a sale or purchase the purchase-money, or in the case of a lease the value of the property, shall not exceed 500*l.* The word "property" occurs twice in this enactment. In the earlier context it clearly includes the whole fee simple estate in the property in question. This was assumed in *Foster* v. *Reeves.* (9) In the later context it can mean no less. In the present case the value of the fee simple was more than 500*l.*

Haden, for the respondent. The doctrine that after conveyance of freehold estate there can be no rescission for an innocent misrepresentation made during negotiation and inducing the contract of sale is not denied; but that doctrine does not apply to a lease. It is agreed on all hands that the doctrine does not apply to an executory contract; it has always been held that such a contract may be rescinded for misrepresentation, however innocent. A lease is a contract, even though it be under seal; it passes no estate, and so there is no difficulty as to devesting an estate already vested; all the covenants in a lease remain in fieri, and so there is really no difficulty as to reopening a completed transaction. In *Kennard* v. *Ashman* (10) Wills J. clearly expressed the opinion that the lease in that case might have been rescinded for an innocent misrepresentation, if the

(1) (1880) 5 App. Cas. 925, at p. 937.
(2) (1887) 37 Ch. D. 96, at p. 102.
(3) [1905] 1 Ch. 326.
(4) (1907) 98 L. T. 44.
(5) [1900] 1 Ch. 616.
(6) (1866) L. R. 2 Ex. 72.
(7) (1880) 5 C. P. D. 376.
(8) (1883) 11 Q. B. D. 255.
(9) [1892] 2 Q. B. 255.
(10) (1894) 10 Times L. R. 213.

1910

ANGEL v. JAY.

misrepresentation had been established; and in *Whittington* v. *Seale-Hayne* (1) Farwell J. expressed no opinion that a lease could not be rescinded, although such a decision would have been a short way to the conclusion of that case.

Secondly, as to the jurisdiction of the county court, the words "the property" in s. 67, sub-s. 4, of the County Courts Act, 1888, mean the property passing between the parties: *Rex* v. *Judge Whitehorne*. (2) In the case of a sale or purchase the purchase-money is the measure of the Court's jurisdiction: that must mean the purchase-money for the property sold. If a life estate passed on a contract of sale at a price of less than 500*l*, the Court would have jurisdiction, even though the value of the fee simple might exceed 500*l*. It would be strange if, where the contract is for a lease instead of for a life estate, the county court should have no jurisdiction. The question of the jurisdiction of the Court in a matter between two persons ought not to be affected by the right or interest of some third party not in any way concerned in the matter in dispute.

Foà, in reply. Upon the first point, the opinion of Wills J. in *Kennard* v. *Ashman* (3) was obiter. In *Whittington* v. *Seale-Hayne* (1) the point did not arise for decision. Therefore neither of these cases is an authority upon the matter in question. The same applies to *Rex* v. *Judge Whitehorne* (2), which was a decision upon an earlier part of the section and not upon the enactment in question.

DARLING J. In this case an action was brought for damages for misrepresentation made during negotiation for the taking of a lease, the alleged misrepresentation being that the defendant, who let the house to the plaintiff, represented that the drains were in good order, when in fact they were defective. The county court judge has found that this was a misrepresentation, although an innocent one in the sense that the defendant did not make it knowing that it was false. After the lease had been executed the plaintiff went into possession and held the lease for some six months. On these facts the county court judge rescinded the lease.

(1) (1900) 82 L. T. 49. (2) [1904] 1 K. B. 827.
(3) 10 Times L. R. 213.

Mr. Foà for the defendant has argued that the county court judge could not rescind an executed, as opposed to an executory, contract. Mr. Haden for the plaintiff to some extent admits that doctrine so far as it applies to contracts for the sale of freehold estates executed by conveyance, but he denies its application in case of a lease, because, as he contends, the foundation of the doctrine, namely, that when property has passed the persons concerned cannot be placed in the same position as they were in before the estate became vested, applies in the case of a conveyance of freeholds but does not apply in the case of a lease. The doctrine is thus stated in Dart on Vendors and Purchasers, 7th ed., p. 808: "The principle could not be extended to the taking away *after completion* the price of the property, which at law had become absolutely the vendor's, without advancing the interference of the Court of Equity further than has yet been authorized by judicial decision. In other words, misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a Court of law, or, as Lord Selborne stated it, 'unless there is fraud or misrepresentation amounting to fraud.'" I may say at once that no such misrepresentation as that is suggested in the present case. Then is there any reason for saying that this doctrine, which would prevail in the case of a conveyance on the sale of freeholds, ought not to be applied in the case of a lease? Mr. Haden has contended that there is a reason, namely, that under a lease there are recurrent acts to be done by the lessee, while there are no such acts to be done by the purchaser of a freehold estate on a sale out and out; in other words, that a lease is in substance and effect an executory and not an executed contract. That distinction has never yet been drawn in any reported case or in any text-book. On the contrary, one of the cases cited, *Legge* v. *Croker* (1), was a case of a lease, and it was there held that a lease deliberately executed cannot be set aside for a misrepresentation which is not wilful. This doctrine has not been confined to cases of conveyances, whether of freeholds or

(1) 1 Ball & B. 506.

1910

ANGEL v. JAY.

Darling J.

leaseholds; in *Seddon* v. *North Eastern Salt Co.* (1) it was applied in the case of a sale of shares in a company, and I have come to the conclusion that, there being here an executed contract and no suggestion of fraud, the county court judge was wrong in ordering rescission of this lease. That might have been done if the contract had not been executed; but here there had been completion, the plaintiff had gone into possession under the lease, and nothing remained to be done. That being so, on the authority of the cases cited for the appellant, we must come to the conclusion that the county court judge was wrong.

Then a second point is raised, namely, that the county court judge had no jurisdiction in this matter, because the jurisdiction is conferred by s. 67, sub-s. 4, of the County Courts Act, 1888. [The learned judge read the enactment, and continued.] This is a lease. It is admitted that the value of the property, if the property means the house and land leased, was over 500*l.*, but that the value of the interest which the defendant had in the premises, and consequently the value of what he conferred upon the plaintiff, was less than 500*l.* Mr. Haden contended that in the case of a lease "the value of the property" must mean the value of the interest conferred by the lease and not the value of the lessor's interest. Now in the case of a sale or purchase the Legislature seems to have contemplated as the measure of the county court's jurisdiction the value of the interest which passes on the sale or purchase, for in that case the purchase-money is taken as the measure; but in the case of a lease the consideration is not taken as the standard; nothing is said as to the rent reserved or the value of the covenants to be performed or about any premium to be paid by the lessee. The only thing to be considered is the value of the property. That being so, I am guided by the words of Wills J. in *Rex* v. *Judge Whitehorne* (2): "There is only one safe rule, I think, to apply in construing an Act of Parliament where we have nothing except the bare words, and that is to give them their natural meaning. 'Property' is a very large word . . . ." In the case of a lease the question is the value of the property; that is, in my opinion, the value of the demised property, and not what is given as the

(1) [1905] 1 Ch. 326. (2) [1904] 1 K. B. 827, at p. 830.

consideration for the interest demised. In my judgment, therefore, Mr. Foà is right on the second point also, and this appeal must be allowed.

BUCKNILL J. On the second point I have nothing to add. With regard to the first point, there are cases which establish that where a contract for the sale or conveyance of property has been induced by an innocent misrepresentation of the vendor, the contract can be rescinded while still executory, but cannot be rescinded after completion. It has been argued that the doctrine that the contract cannot be rescinded after completion does not apply in the case of a contract for a lease, but *Legge* v. *Croker* (1) was a case of a lease to which the doctrine was applied, and so also was *Brett* v. *Clowser* (2), which, although it was not a case of rescission, is nevertheless in point, because it was a claim for compensation to which the same principle applies. It was there held that after completion of a lease there could be no compensation for an innocent misrepresentation. These two cases are therefore authorities in the present case and decisions that for present purposes a lease stands on the same footing as a sale or conveyance of a freehold. Those cases have never been treated as wrongly decided; on the contrary, *Legge* v. *Croker* (1) has repeatedly been cited with approval. There is one passage from the judgment of Blackburn J. in *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Co.* (3) to which I desire to call attention. "There is, however," said the learned judge, "a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to shew that there was a fraudulent misrepresentation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to shew that there is a complete

(1) 1 Ball. & B. 506.
(2) 5 C. P. D. 376.
(3) (1867) L. R. 2 Q. B. 580, at p. 587.

1910

ANGEL v. JAY.

Bucknill J.

difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." No one could say that there is such a complete difference between a sanitary and an insanitary house as to constitute a failure of consideration after the lessee had gone into and remained in possession for half a year. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Sherwood, Baker & Hart.*
Solicitors for respondent: *Grammer, Hamlin & Co.*

W. H. G.

1910
Nov. 29.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* TAYLOR.

Criminal Law—Larceny—Evidence of Asportavit.

The prisoner put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting an obstruction. The prosecutor grasped the purse and replaced it.—

Held, that there was sufficient evidence of asportavit to support a charge of larceny.

APPEAL against conviction.

At the Wiltshire quarter sessions holden at Warminster on June 28, 1910, the appellant was charged that he feloniously did steal from the person of Alexander Barnes a purse containing the sum of 8*s.* 9*d.* in money, the goods, chattels, and moneys of the said Alexander Barnes, at Warminster on June 2, 1910.

The following evidence was given at the trial:—

The prosecutor, Alexander Barnes, was a cattle dealer. He had been attending an agricultural show at Warminster on June 2, 1910, and, being minded to return to Frome by a train leaving Warminster at 8.38 P.M., he was waiting in the waiting-room with his daughter, aged eight years, when the train came

into the station. Then, to quote the words of the prosecutor, "I went to look for a carriage and as I was walking up the prisoner came up and put his hand in my trouser pocket . . . . He pulled my purse out to the edge of my pocket and I think the corner lodged under the edge of my belt. I grasped it out of his hand and put the purse back and made a grasp to try and catch him."

In cross-examination the prosecutor said that the purse was caught in his belt and in the corner of his pocket. Then the following questions were put and answers given:—

"Q. It never left your possession at all?

"A. It came out to the end and I grasped it like that.

"Q. He never got it away from you?

"A. Nothing more than that."

In re-examination the following questions were put and answers given:—

"Q. When you seized his hand was the purse in his hand the moment you seized it?

"A. It was at that very moment.

"Q. Where was his hand?

"A. It was just outside there."

The chairman directed the jury as follows:—

"The prisoner is charged that he did on June 2 steal from the person of the prosecutor a purse in which there was a certain amount of money. The facts are before you. If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge, ... With regard to the facts of the case you have Mr. Barnes's evidence before you that on June 2, which you will remember was the day of the show, he was at the station shortly after half-past 8, and that when the train came in—the platform as you may imagine was crowded—he was looking for a carriage with a little girl of eight when the defendant came behind him, put his hand in his trouser pocket and pulled the purse out of the pocket, when it caught in his belt. Then, as Mr. Barnes puts it in his own phraseology, 'I grasped it out of his hand, put the purse back in my pocket, and tried to catch him. I followed him down the avenue.' He was only pushed, he says

1910

REX v. TAYLOR.

in cross-examination, once. 'I was close to the carriage door, but the defendant was not pushing in front of me; he was pushing behind me.' The prosecutor's story is that he turned round to catch him, and that the defendant then bolted. . . . ." After dealing with other evidence for the prosecution, the chairman continued: "Against that you have the defendant's evidence which he has given on oath, and upon which he has been cross-examined in the box. . . . . His account of what occurred is that the platform was full; that everybody was rushing for carriages; that he was pushed up against the prosecutor; that the prosecutor then turned round and went for him, and that he backed away from the prosecutor. Mr. Barnes seems to have gone for him again, and then he took to his heels. He ran down the avenue, and, he says, 'When I saw him stop I got across the path to get to the railway to catch my train, and I was pulled back by a man. I asked him what he was stopping me for, and told him that if I did not catch the train I should not get back to Bath that night.' He was handed over to the police and so on.

"Well, gentlemen, what you have to decide is the credibility of the two stories. You have the prosecutor's story of what occurred in the station, and against that you have the defendant's. It is for you to consider whether the defendant has given an explanation of the circumstances of what occurred after Mr. Barnes turned on him, and it is for you to say which of the two stories you believe. Will you please consider your verdict?"

The jury on this direction found the prisoner guilty of stealing the purse from the person of the prosecutor.

The prisoner was then charged with being a habitual criminal and found guilty. He was sentenced to penal servitude for three years and afterwards to a period of detention for another five years.

The prisoner appealed against the conviction.

Acton Pile, for the appellant. The chairman misdirected the jury in telling them that the evidence for the prosecution was that the prisoner pulled the purse out of the prosecutor's pocket. The evidence in truth was that the purse had not wholly left the

prosecutor's pocket when he seized the appellant's hand and retook it. Therefore, assuming there was a taking of the purse, there was no carrying away, because there was no severance of the purse from the person of the prosecutor. It never left his possession: *Wilkinson's Case* (1); *Rex* v. *Thompson*. (2) In this respect the present case is distinguishable from *Rex* v. *Lapier* (3) and *Reg.* v. *Simpson* (4), in which cases there was a complete severance already effected before the hand of the defendant encountered the obstacle. In the present case an obstacle, namely, the prosecutor's belt, prevented complete severance.

Then, the evidence not supporting a charge of larceny, the chairman ought to have told the jury that, assuming that they believed the prosecutor's story, they could only find the appellant guilty of an attempt to steal. But if he had been convicted of that offence he could not have been sentenced to penal servitude, because that offence is only a misdemeanour at common law and not punishable by penal servitude. Consequently he could not have been convicted of being a habitual criminal, and the sentence of preventive detention could not have been passed upon him, because s. 10 of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), which provides for such a conviction and sentence, only applies where the Court passes sentence of penal servitude. Therefore both convictions were wrong and ought, with the sentences based upon them, to be quashed.

A. J. Lawrie, for the Crown. The cases cited on behalf of the appellant are all cases of stealing from the person. In the case of simple larceny very slight evidence of asportation is sufficient: *Rex* v. *Thompson*. (2) The mere raising of a chattel from its position of rest has been held to be a complete asportation: *Rex* v. *Walsh* (5); *Rex* v. *Coslet*. (6) In the present case there was evidence on which the appellant could have been convicted of simple larceny. That is an offence of which the jury could on this indictment have found the appellant guilty: 2 Hale, Pleas of the Crown, 302; the verdict shews that the jury must have been satisfied of facts which proved the appellant guilty of

(1) (1598) Hale, P. C. 508.
(2) (1825) 1 Moo. C. C. 78.
(3) (1784) 1 Leach, 320.
(4) (1854) 24 L. J. (M.C.) 7.
(5) (1824) 1 Moo. C. C. 14.
(6) (1782) 1 Leach, 236.

1910

REX v. TAYLOR.

larceny, and therefore the Court may under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), instead of allowing the appeal, substitute for the verdict of the jury a verdict of guilty of larceny and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for simple larceny. Larceny is punishable by penal servitude; a sentence of preventive detention may legally follow such a sentence; and in the circumstances of this case the Court may well pass the same sentence as that pronounced by the Court below.

The judgment of the COURT (Darling, Pickford, and Bankes JJ.) was delivered by

PICKFORD J. This is an appeal against a conviction before the Wiltshire quarter sessions. The appellant, having been convicted of larceny from the person and of being a habitual criminal, was sentenced to a term of three years' penal servitude and five years' preventive detention. Objection is taken on his behalf that there was no evidence on which he could be convicted of larceny from the person, that the chairman of quarter sessions misdirected the jury as to the effect of the evidence, and that the only offence proved was an attempt to commit larceny, for which he could not have been sentenced to penal servitude and consequently not to a term of preventive detention.

It may be that the evidence was not stated with absolute accuracy by the chairman when he said to the jury that the appellant pulled the purse out of the prosecutor's trouser pocket; the evidence was not that the purse was taken out of the pocket, but that it was removed to the edge of the pocket where it caught the belt. Earlier in the summing up the chairman had said "If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge," that is to say, the charge of larceny from the person. That is not an accurate direction. The fact that the purse was in the appellant's hand was not sufficient evidence of asportation to support a conviction of larceny from the person. But then the chairman went on to state the effect of the evidence and the story told by the appellant, and concluded in these words: "It is for you

to consider whether the defendant has given an explanation of the circumstances which occurred after Mr. Barnes turned on him, and it is for you to say which of the two stories you believe." He therefore in the clearest terms left to the jury the choice between the two stories, and the jury accepted the story of the prosecutor; that is to say they found that the appellant took the purse in his hand and lifted it to the edge of the prosecutor's pocket, and that there it caught the belt. They have therefore believed facts which in our view constitute a simple larceny, because the authorities point to this, that if a man puts his hand into another man's pocket, seizes his purse, removes it from the position in which it was at the bottom of the pocket to the edge of the pocket, and is only prevented from taking it entirely out of the pocket by the accident that it meets an obstruction in the shape of the man's belt, that is a sufficient asportation to constitute a simple larceny. The jury then have accepted a state of facts which justify a conviction of simple larceny. Then by s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, the Court instead of allowing the appeal may substitute for the verdict of the jury a verdict of guilty of the offence of a simple larceny, and pass such a sentence in substitution for the sentence passed at the trial as may be warranted in law for the offence of simple larceny, not being a sentence of greater severity. Acting on the powers conferred upon the Court by that enactment we find the prisoner guilty of simple larceny, and we pass upon him the same sentence as that which was passed by the quarter sessions. The sentence of three years' penal servitude will therefore stand. Upon that the conviction of being a habitual criminal may properly be superimposed, the facts in this case amply justifying that conviction, and as the sentence of five years' preventive detention is not, as a sentence, complained of, that sentence will also stand, and this appeal will be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

W. H. G.

C. A.
1910
Dec. 6, 12, 13.

[IN THE COURT OF APPEAL.]

THE KING *v.* LOCKE.

Local Government—Municipal Corporation—Urban Authority—Borrowing Powers—Security for Loan—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 233.

Quære, whether the borrowing powers conferred upon an urban authority by s. 233 of the Public Health Act, 1875, enable it to borrow or reborrow money (for other than temporary purposes) without securing the repayment of the loan by a mortgage of the rates or fund on the credit of which the money is borrowed.

Decision of the Divisional Court, [1910] 2 K. B. 201, reversed on a further agreed statement of facts, upon which the Court of Appeal held that there was no reborrowing by the urban authority, but merely a transfer of an old loan.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Bray and Pickford JJ.); reported [1910] 2 K. B. 201.

A rule nisi had been granted calling upon the respondent H. Locke, the auditor appointed to examine the accounts of the Corporation of Bournemouth for the financial year ended March 31, 1909, to shew cause why a writ of certiorari should not issue directed to him to remove into the High Court a certain certificate of disallowance and surcharge made by him (together with his reasons and grounds for the same) and dated September 10, 1909, of the sum of 2*l.* 12*s.* 6*d.* disallowed and surcharged upon the applicants, certain members of the council of the borough of Bournemouth, who authorized the payment and signed the cheque by which the payment was made, which sum was part of a sum of 5561*l.* 0*s.* 6*d.* paid to the National Provincial Bank of England, Limited, on or about October 29, 1908. The rule was obtained by the applicants upon the ground that the 2*l.* 12*s.* 6*d.* disallowed was interest upon a loan which the corporation were authorized to borrow by s. 233 of the Public Health Act, 1875 (1),

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233: "Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs charges and expenses incurred or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans

and was payable out of the district fund by virtue of s. 207 of that Act.

The following statement of facts, which appears in the report of the case in the Divisional Court, is taken in substance from the judgment of Lord Alverstone C.J. On April 3, 1900, the Local Government Board sanctioned the borrowing by the Bournemouth Corporation of the sum of 600*l.* to be borrowed on the credit of the charges on rates, which the corporation were entitled to mortgage, for the purpose of securing the repayment thereof together with interest, the amount to be repaid with interest within ten years from the date of borrowing thereof. In accordance with this sanction, on May 10, 1900, the corporation borrowed from the Wilts and Dorset Bank the sum of 600*l.*, and mortgaged a certain proportion of the rates, charges, and assessments as security for the advance. In February, 1902, steps were taken with a view to transferring the corporation's account to the National Provincial Bank, and in pursuance of the arrangement hereinafter referred to the National Provincial Bank repaid the principal and interest due to the Wilts and Dorset Bank upon this and a large number of other loans advanced on mortgage by the Wilts and Dorset Bank. The mortgages were not transferred to the National Provincial Bank, but receipts for the money were indorsed thereon. The terms of the arrangement with the National Provincial Bank (which were approved by the finance committee of the corporation on March 25, 1902, and confirmed by the council on April 1, 1902) were as follows:—

The bank to advance to the corporation 500,000*l.* upon the following terms:

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contracted under the Sanitary Acts or this Act, borrow or re-borrow, and take up at interest, any sums of money necessary for defraying any such costs charges and expenses, or for discharging any such loans as aforesaid.

"An urban authority may borrow or reborrow any such sums on the credit of any fund or all or any rates or rate out of which they are authorized to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate . . . ."

C. A. 1910

REX v. LOCKE.

(1.) Interest to be bank rate, with a minimum of $3\frac{1}{2}$ per cent. and a maximum of $4\frac{1}{2}$ per cent.

(2.) The corporation to undertake as soon as the advances have reached 250,000*l.* or 300,000*l.*, if called upon so to do by the bank, to issue stock at such price as the bank may advise, not to be below 94 (on the assumption that the stock will be a trustee stock), the corporation to bear the expenses of underwriting, whatever they may be.

(3.) The banking account of the corporation to be transferred to the National Provincial Bank.

(4.) The stock to be issued through the National Provincial Bank, and that bank to be constituted registrars of the existing as well as future stock, assuming that future stock would be issued pari passu with and as one and the same stock as existing. The cost of issue to be as follows:—Underwriting (in present state of market), 1 per cent., with an additional $\frac{1}{4}$ per cent. to brokers; $\frac{1}{4}$ per cent. on all successful applications made by brokers; the bank fee would be $\frac{1}{8}$ per cent. on nominal amount of stock offered; the brokers to make no charge for name appearing on prospectus or giving advice; brokers' charge for Stock Exchange quotation, 52*l.* 10*s.*; 200*l.* to 250*l.* advertising (this would be greatly at discretion of the corporation); 80*l.* to 100*l.* printing books and stationery; $\frac{1}{8}$ per cent. Government duty on amount issued; annual costs of management by bank, 1 per cent. on amount of each year's dividend, with a minimum of 50*l.* For this the bank would keep the register, ask for the money necessary to pay the dividends, and prepare and pay the dividends as they came due.

(5.) The bank would charge interest on moneys due to the bank only on the amount of the excess of sums borrowed over balances standing to the credit of the corporation, the sum of 1000*l.* to 1500*l.* being allowed as a "free balance" upon which no interest is to be allowed.

(6.) The banking account to be opened in the name of the mayor, aldermen, and burgesses of the county borough of Bournemouth, and to be operated upon by cheques signed by a member of the council, the borough treasurer, and the borough accountant. In the temporary absence of the borough treasurer

from illness or other cause the sub-manager of the bank to be given authority to sign for him.

(7.) The form of cheque to be used to be according to the specimen attached hereto.

No mortgages or other documents securing the National Provincial Bank were executed, and the grounds of the surcharge were as stated in the auditor's certificate, namely :—

"(1.) Because on the evidence before me the council have borrowed moneys without giving any proper security for the sums advanced.

"(2.) Because moneys borrowed by the council under the provisions of s. 233 of the Public Health Act, 1875, to defray expenses incurred by them in the execution of the Act can only be borrowed on the credit of the fund or rate out of which the council are authorized to defray such expenses.

"(3.) Because the borrowing powers of the council are subject to statutory conditions, and in dispensing with the whole or any part of such conditions they are acting contrary to law, and any payment of interest on moneys borrowed without the fulfilment of the statutory conditions in that behalf is illegal: *Attorney-General* v. *De Winton.* (1)

"(4.) Because the council have no expressed or implied authority to borrow moneys other than in the manner authorized by statute: *Reg.* v. *Reed.* (2)

"(5.) Because there is no authority in law for the payment of interest on moneys borrowed in the manner here adopted and on which interest purports to have been paid."

Upon the above statement of facts the Divisional Court discharged the order nisi for a certiorari, holding that the borrowing powers conferred upon an urban authority by s. 233 of the Public Health Act, 1875, did not enable it to borrow money for other than temporary purposes without securing the repayment of the loan by a mortgage of the rates or fund on the credit of which the money was borrowed, and that, therefore, a payment of interest made on behalf of the authority upon money borrowed for a permanent purpose without security was illegal. The applicants appealed.

(1) [1906] 2 Ch. 106. (2) (1880) 5 Q. B. D. 483.

C. A. 1910

REX v. LOCKE.

On December 6, 1910, the appeal came on for hearing, but shortly after the opening the Court expressed the opinion that the facts were insufficiently ascertained, especially with regard to the mode in which the balance due to the Wilts and Dorset Bank had been paid off by or on behalf of the corporation, and the hearing of the appeal was adjourned in order to enable the parties to agree, if possible, upon further facts. The parties agreed to a further statement of facts which was in the following terms:—

1. The question raised by the order nisi for the certiorari is whether the auditor was right in disallowing and surcharging on the applicants for the order nisi a sum of 2*l.* 12*s.* 6*d.* paid by the corporation on October 29, 1908, to the National Provincial Bank of England, Limited, by way of interest on the balance of a loan of 600*l.* mentioned below then outstanding.

2. The said 600*l.* was borrowed under the Public Health Act, 1875, pursuant to a sanction of the Local Government Board, dated April 3, 1900. This sanction is annexed. The lenders were the Wilts and Dorset Bank, Limited, and they took a mortgage by way of security for the loan on the general district rate, dated May 10, 1900. Copy of mortgage is annexed. An entry in respect of the said mortgage was made in the mortgage register of the corporation. Copy of the said register is annexed.

3. In March, 1902, the corporation had been authorized to borrow sums of money under special Acts and sanctions pursuant to statutory authority given by the Local Government Board and Board of Trade. On April 1, 1902, such authorized borrowing powers remaining unexhausted exceeded in amount 500,000*l.* This does not include the sanction of April 3, 1900.

4. In March, 1902, the corporation were contemplating the issue of further stock pursuant to Part V. of the Public Health Act Amendment Act, 1890, under a sanction to be obtained from the Local Government Board. This stock was to be a consolidation of a number of authorized loans. The sanction was in fact obtained on March 14, 1903, and is annexed hereto. The Local Government Board, in giving their sanction, excluded from it all loans which had a lesser period than ten years to run.

5. In March, 1902, the corporation's bankers were the Wilts and Dorset Bank. The corporation had at a previous period issued corporation stock and were then contemplating, as above stated, the creation of further stock. Communications passed with their said bankers and also the National Provincial Bank of England on the subject, with the result that (1.) the corporation made arrangements to transfer their banking account to the latter bank and including therein all loans from the former bank; (2.) it was found that the moment for the creation of stock had for several reasons not then arrived, and that a propitious time was to be awaited which it was anticipated would arrive. The documents annexed to the affidavit of the applicants made December 21, 1909, came into existence at this time in connection with the transfer. There are to be added to them a letter from the National Provincial Bank to the town clerk dated April 16, 1902, and those hereafter mentioned.

6. There is annexed hereto a pass-book of the corporation shewing their loans account with the National Provincial Bank. The sum of 77,599*l.* 9*s.* 7*d.*, with which it commences, was the amount paid to the Wilts and Dorset Bank to effectuate the above-mentioned transfer. The payment was made by cheque dated March 24, 1902, as appears from the copy annexed. The details of the said sum appear from the copy statement annexed, which statement was handed to the National Provincial Bank at the time and in the course of the transaction. The cheque was handed to the manager of the Wilts and Dorset Bank by the town clerk and the borough accountant. The said manager undertook that on payment of the cheque he would hand over to the town clerk the mortgages given to his bank with receipts at foot thereof, and also the sanctions for loans which had been deposited with them. This undertaking was duly performed. There is annexed hereto the corporation pass-book from the said bank which relates exclusively to the said loan of 600*l.*, the balance whereof is shewn as paid off by the National Provincial Bank on March 24, 1902. The entries in the said book are all made by the officers of the Wilts and Dorset Bank. Upon receipt of the said sanctions they were deposited with the National Provincial Bank. The manager of the National Provincial Bank

C. A. 1910

REX v. LOCKE.

stated that his bank did not desire to have mortgages or transfers of mortgages, as it was not their practice to take mortgages from their corporation customers. They would and did, however, require the sanctions for the loans to be deposited with them.

7. The said sanctions included that for the loan for 600*l.* aforesaid, and the balance of this loan was included in the said 77,599*l.* 9*s.* 7*d.* There is annexed hereto a statement shewing the times and amounts of the repayment of the said loan of 600*l.* with the names of the payees of such amounts.

8. The mortgages handed to the town clerk as mentioned in paragraph 6 hereof have remained and are now in his custody.

9. The said pass-book of the National Provincial Bank shews the advances made by that bank pending the issue of stock and in anticipation thereof, and shews that the same were paid off by November 4, 1903, and that at least 424,378*l.* 6*s.* 10*d.* was paid off on November 3, 1903, by the entry "To issue of stock." The stock was issued in July, 1903, the last instalment of the issue price (92*l.* per 100*l.*) being payable on September 25, 1903. The said bank's advances were temporary in the above manner.

10. In 1903 the said 600*l.* loan had less than ten years to run, and was for that reason excluded from the stock issue by the Local Government Board.

Dec. 12. *Danckwerts, K.C.* (*C. Fleetwood Pritchard* with him), for the appellants. The Divisional Court was wrong in thinking that security is necessary in the case of all borrowings by a local authority, and the auditor was wrong in disallowing the payment of interest on the ground that no mortgage had been granted, or transferred, to the National Provincial Bank. The effect of s. 233 and the other sections of the Public Health Act, 1875, regulating the borrowing powers of local authorities is that a local authority is entitled to mortgage the rates as security for a loan, but is not compelled to do so; the giving of security in the present case was therefore not compulsory, but was a matter to be settled between the corporation and the lender. The fact that the loan of 600*l.* was originally made by the Wilts and Dorset Bank upon the security of a mortgage satisfies the contention of the auditor; it is immaterial that the mortgage was not transferred to the

National Provincial Bank. The corporation had the assent of the Local Government Board to the loan, which assent is only required to the borrowing and not to the way in which the loan is to be secured. Further, it is clear that the loan from the National Provincial Bank was merely a temporary loan, intended to tide over the period between the actual borrowing from the bank and the issue of the stock; being a temporary transaction, it comes within the principle of *Smith* v. *Southampton Corporation*. (1) Upon the facts it is plain that the transaction amounted to a transfer from the Wilts and Dorset Bank to the National Provincial Bank of the corporation's debt to the former, and that there was not a new loan by the National Provincial Bank to the corporation. Paragraph 5 of the statement of facts makes it impossible to say that the debt was not transferred. That being so, it was not possible to compel the National Provincial Bank to take a transfer of a security with which they preferred to dispense. [He also cited *In re Wrexham, Mold, and Connah's Quay Railway* (2); *Bannatyne* v. *MacIver* (3); Local Loans Act, 1875 (38 & 39 Vict. c. 83), ss. 4, 5, 23; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 52.]

Macmorran, K.C., and *Rowlatt*, for the respondent. Upon the facts it is clear that this was not a mere temporary loan to be covered by the issue of stock. Further, the debt to the Wilts and Dorset Bank was paid off by the corporation's own cheque, and there was no transfer of that debt to the National Provincial Bank, but a fresh borrowing from them by the corporation. In any event the result of the transaction was that the latter bank became creditors of the corporation without a mortgage de facto. But the important question is the proper construction of s. 233 of the Public Health Act, 1875. The expression "may mortgage" is not merely permissive; it is intended to point to the mode in which a corporation may borrow on the credit of its funds. When ss. 233—239 are read together they shew that the corporation may borrow on the credit of its rates and on mortgage of them; there must be a mortgage in every case of a borrowing on the credit of the rates. It is clear from the

(1) [1902] 2 K. B. 244. (2) [1899] 1 Ch. 440.
(3) [1906] 1 K. B. 103.

C. A. 1910

REX v. LOCKE.

language of s. 235 that the Legislature contemplated that the borrower would be a mortgagor, for that section uses the term mortgagees as synonymous with lenders. It is true that in the present case there was originally a mortgage to the Wilts and Dorset Bank, but the statute ceased to be complied with when that mortgage was paid off and the money was reborrowed from another lender without security.

[KENNEDY L.J. Do you contend that the lender cannot give up his security?]

Yes; that is the effect of the legislation. The argument for the respondent derives support from the provision of s. 237 that a register of the mortgages on each rate is to be kept at the office of the local authority; this provision was inserted for the benefit of the public by entitling them to inspect the register and see the particulars of all moneys borrowed. The corporation cannot rely upon the sanction of the Local Government Board to the original borrowing, for that was only a sanction to borrow on mortgage and there was no sanction to the reborrowing. In such a transaction as the present the requirements of the statute are not satisfied unless there is either a transfer of the existing mortgage or a new mortgage.

Danckwerts, K.C., in reply.

Cur. adv. vult.

Dec. 13. VAUGHAN WILLIAMS L.J. I think that upon this appeal we have not to decide the question which is dealt with in the very accurate head-note of the report of the case in the Court below. I wish to say, in passing, that, as to the words in brackets in the head-note, "for other than temporary purposes," even if we had to decide the question which was decided by the King's Bench Division, I should come to the conclusion that this borrowing in this case was not, at any stage thereof, a borrowing for temporary purposes. I think that a borrowing for temporary purposes means a borrowing under such conditions as those which were discussed in the case of *Smith* v. *Southampton Corporation* (1); but it will be seen from the judgment in that case that the decision there turned upon

(1) [1902] 2 K. B. 244.

a question very remote from the suggestions made in the argument before us in this case as to what would constitute a temporary loan for a temporary purpose. Channell J. in his judgment in that case says (1): "In this statute there is a clause permitting retrospective payments or retrospective rating (I draw no distinction between the two at present) within a limit of six months, and the question is what that means." There is no suggestion in the present case that there was a temporary loan in the sense that is permitted by the statute referred to by Channell J., and if this case depended on my being satisfied that there was a temporary loan in that sense, I should not be disposed to find the loan was temporary. But this case turns, to my mind, upon a very different matter. It will be seen that, at the end of his judgment, Lord Alverstone C.J. says (2): "In support of the rule Mr. Danckwerts attempted to justify the payment upon the ground that the National Provincial Bank were entitled to stand in the shoes of the Wilts and Dorset Bank and to be treated for the purposes of this surcharge as though they were transferees of the particular mortgage which secured the 600*l.* advanced by the Wilts and Dorset Bank. No such point appears to have been raised before the auditor. As a matter of fact the mortgages were surrendered to the corporation and were not in existence at the time when the payment was made, so that in our opinion this contention cannot be allowed to prevail under the circumstances of this case."

Now it is upon this question which was argued before the King's Bench Division,—as to whether there had not been a transfer of this debt to the National Provincial Bank of England so that the debt, instead of being a dead debt, was a live debt and could be transferred, and the securities also, certain mortgages,—that I wish to point out that the facts upon which we have to decide the present appeal are not quite the same as the facts upon which the King's Bench Division had to decide. If one looks at p. 202 of the report of the case in the Court below it will be found that the reporter says "The following statement of facts is in substance taken from the judgment of

(1) [1902] 2 K. B. at p. 253. (2) [1910] 2 K. B. at p. 209.

C. A. 1910

REX v. LOCKE.

Vaughan Williams L.J.

Lord Alverstone C.J.," and they are then set forth in a very convenient form. I need not read them at length, but these facts begin with the borrowing in 1900, and they set forth, in due course, the sanction given in accordance with s. 233 of the Public Health Act, 1875, and they also set forth the mortgage of the rates as security for the loan which was advanced under the section; it was a loan of 600*l.* advanced by the Wilts and Dorset Bank. Then follows a statement that steps were taken with a view to transferring the corporation's account to the National Provincial Bank, "and in pursuance of the arrangement hereinafter referred to the National Provincial Bank repaid the principal and interest due to the Wilts and Dorset Bank upon this and a large number of other loans advanced on mortgage by the Wilts and Dorset Bank. The mortgages were not transferred to the National Provincial Bank, but receipts for the money were indorsed thereon." Then come the terms of the arrangement with the National Provincial Bank, which it is unnecessary for me to read at length. I wish to say, however, that when this case was originally argued before us there was a considerable doubt as to what the true facts were; and thereupon, on the suggestion of this Court, there was an adjournment in order that the two bodies that are really concerned in this argument, the Local Government Board and the Corporation of Bournemouth, might agree upon facts. After a short time the facts were agreed upon. As to many of the facts, I think the most convenient way of stating them is to merely read them out with the dates, from a convenient index of documents which appears at the beginning of the statement of facts. We get, first, the sanction of the loan of 600*l.*, dated April 3, 1900—that is the loan by the Wilts and Dorset Bank to the corporation. Then, Mortgage for securing 600*l.*, dated May 10, 1900. Next, Extract from mortgage register; and then there is, Sanction for creation of additional stock, dated March 14, 1903. The corporation had come to the conclusion that it would be a convenient plan to have this issue of stock, and when it came to be carried out they obtained the sanction of the Local Government Board. It was not carried out immediately, for it was about a year before the market was in such a condition that it

was convenient to raise the loan. Then comes, Letter from National Provincial Bank to town clerk, dated April 16, 1902. I do not think anything turns upon that letter, which is a short formal letter enclosing the heads of the agreement between that bank and the corporation which are set out in the report of the case in the Divisional Court.

When I read the agreed statement of facts, and consider what the negotiations were which led to this agreement for the transfer of the accounts of the Bournemouth Corporation from the Wilts and Dorset Bank to the National Provincial Bank of England, it is plain that the original intention of the parties was not that this debt, or this loan by the Wilts and Dorset Bank to the corporation, should be blotted out and a new loan obtained from the National Provincial Bank; on the contrary, it is perfectly manifest, upon the antecedent correspondence, that the original intention was that there should be a transfer of this loan, and a transfer of the mortgages securing the loan, to the National Provincial Bank. It was not intended that there should be any new loan; it was simply a case of the assignment of the mortgage debt and the securities for that mortgage debt. It is not necessary for me to read at length the minutes of the corporation and the other papers connected with this matter, because it is an admitted fact that that was the original intention—that when the account of the corporation with the Wilts and Dorset Bank was transferred to the National Provincial Bank of England, there should be a transfer of the debt and a transfer of the mortgage securing the debt. But it is said, in answer to this, that, if the pass-books and the accounts are looked at, it will be seen that the way in which the transaction was carried out was that the National Provincial Bank lent a sum of money to the corporation, that there was a new borrowing from the National Provincial Bank, and that with this money so borrowed the corporation paid off the debt due to the Wilts and Dorset Bank. I agree that, if the pass-books are looked at, that was in form what happened. But this was to my mind mere machinery, and if we are of opinion, as I am of opinion, that in substance this was a transaction, and was intended by all the parties to be a transaction, in which

C. A. 1910

REX v. LOCKE.

Vaughan Williams L.J.

there was a transfer of the mortgage debt and a transfer of the securities for that debt, we ought not, simply because it was carried out in this form, to alter the position of the parties to this transaction. We have the admitted intention of the parties to this transaction, and when we are told that the agreement was not carried out exactly in the way intended, there appears even then the fact that the documents relating to the mortgage, including the sanction of the Local Government Board as well as the mortgage, were not only intended to pass to the National Provincial Bank, but were in fact taken to that bank. It does not seem to me that that alters the substance of the transaction any more than if, in the first instance, the Wilts and Dorset Bank, having got their security, for some reason or other had been willing to surrender, and had surrendered, the security, although the debt was still alive.

Now, up to the present moment, I have been speaking of the view that I take of the history of this transaction, but I think that I ought now to go through the statement of facts which has been agreed upon between the parties. [His Lordship read the statement, beginning at paragraph 5, and continued :—]

The conclusion I have come to on the documents referred to and upon this statement of facts is that, as between the parties, there was no new lending by the National Provincial Bank or new borrowing by the corporation ; the transaction was a transfer of the old debt and the old securities.

That being so, in my judgment, there being the sanction for this old loan which was transferred, and there being the security for it, the disallowance of this interest and the surcharge by the auditor cannot be sustained. I said at the beginning of this judgment that I did not propose to discuss at length the effect of s. 233 of the Public Health Act, 1875, and the other sections that have been referred to. It seems to me a very difficult question whether in a case where the proper sanction is obtained, be it a sanction for the original borrowing or, what is equally necessary, a sanction for the reborrowing, the lender must take security in order to make the borrowing and the loan legal. Be that how it may, I think I may say as to the main argument which was urged upon us by Mr. Macmorran—that it was

necessary there should be registration so that people who contemplate lending might see the exact amount that had already been advanced—that it broke down entirely, and I need not discuss it further. The conclusion to which I come is that there was no reborrowing here, but a transfer of the old loan. Under these circumstances I think that there is nothing illegal in this loan, that the surcharge in respect of interest cannot be sustained, and that this appeal must be allowed.

BUCKLEY L.J. The auditor, the respondent to this appeal, surcharged the appellants with this sum of 2*l.* 12*s.* 6*d.* upon grounds which are stated in his certificate of September 10, 1909, of which the principal is in these words: "I have made the said disallowance because on the evidence before me the council have borrowed moneys without giving any proper security for the sums advanced." We have been told that this case has been brought before the Court principally for the purpose of obtaining a decision whether the power of the local authority to borrow under s. 233 of the Public Health Act, 1875, is a power to borrow upon mortgage and upon mortgage only. If that was the purpose, the case has been most unfortunately selected. Sect. 233 empowers a local authority with the sanction of the Local Government Board for the purposes defined in the section to borrow and reborrow and goes on to provide that an urban authority may borrow or reborrow on the credit of the rates, and for the purpose of securing the repayment of any sums borrowed may mortgage the rates. The question sought to be raised was whether the only authority is to borrow on mortgage.

The principal argument addressed to us in support of that contention is one which to my mind wholly breaks down. Mr. Macmorran sought to argue that there is to be found in this statute a provision that there is to be a register which shall disclose to any person entitled to go and look at it what is the amount from time to time due from a local authority; and that, the provisions of the statute being addressed only to the case of mortgages, it must be assumed that it is intended that a local authority shall borrow only on mortgages, for otherwise the

C. A. 1910

REX v. LOCKE.

Buckley L.J.

public would not have the means of ascertaining the aggregate amount borrowed. The only section (Mr. Macmorran was not able to refer to any other) dealing with a register is s. 237 of the Public Health Act, 1875. That section provides for the keeping of a register of mortgages and says that an entry is to be made in the register of certain facts. What are those facts? The number and date of the mortgage and the names and the description of the parties thereto. There is not a word as to stating the amount secured by the mortgage. It was urged that disclosure of the amount must have been the purpose and object of this section. If it was, this section is not unique in falling short of achieving the object which hypothetically it was intended to achieve. A parallel case is to be found in s. 38 of the Companies Act, 1867. It is familiar that the object of that section was to acquaint applicants for shares with the effect and contents of contracts which it was their interest to know. To achieve that object the Legislature passed a section which stated that there must be disclosed the date of and the names of the parties to a contract, but not a word as to disclosing its contents. That section produced nothing but a vast amount of litigation, exposed promoters to the consequences of a statutory fraud, and had little or no effect as regards the protection of the public. I can only say that, if s. 237 of the Public Health Act, 1875, was intended to disclose the indebtedness of the local authority, it has equally failed in its effect. I find no ground for saying that in this statute there is anywhere to be found a provision that the amount of the debt of the local authority, a list of its creditors, and of the amount due to them shall be disclosed to anybody; the Act simply provides for a register of mortgages. From that section is to be drawn, I think, no inference to the effect that the local authority is to have power to borrow only on mortgage. When that question arises for decision it will have to be determined on a critical examination of the language of s. 233; at the present moment it seems to me it is not necessary to decide it.

What happened here was this: the local authority in the year 1900 borrowed 600*l.* upon mortgage, and in 1902 there was existing an unquestionable legal debt secured by mortgage

and bearing interest in favour of the Wilts and Dorset Bank. In that state of facts, on February 26, 1902, the finance committee of the Bournemouth Corporation at a meeting passed this resolution: "The following report of the sub-committee was read. (d) The town clerk was instructed to take the necessary steps with a view of transferring from the Wilts and Dorset Bank to the National Provincial Bank the mortgages to the former now outstanding. Resolved:—That the report be approved and recommended to the council for adoption." Then the report of the finance committee was adopted by the council at a subsequent meeting of March 4. That is the initiation of the thing, and what was there contemplated was obviously a transferring from the Wilts and Dorset Bank to the National Provincial Bank of the debt and of the security for the debt. On March 22 the town clerk wrote to the National Provincial Bank with reference to that intended transfer, and his letter begins thus, referring to a certain interview: "I am desired to say that the council have agreed to transfer their accounts to the National Provincial Bank on the understanding that"—so and so. Then further on, "The amounts due to the Wilts and Dorset Bank will have to be paid off at the same time and these amounts are secured by mortgages of the rates about forty-eight in number. Your bank would I suppose take a transfer of these from the Wilts and Dorset Bank, as to pay off these mortgages and execute new ones will involve such a large expenditure in stamps." What is contemplated there is perfectly obvious. The corporation speak of paying off the Wilts and Dorset Bank, which of course they were going to do in the sense that the Wilts and Dorset Bank were to have all that was due to them, but that discharge is to be effected in such a manner as that the mortgages shall be transferred; in other words, that the debt shall be kept alive and transferred to the National Provincial Bank with its corresponding security. On March 24, two days later, the minutes of the finance committee contain this: "Transfer of banking account." That is in the singular, I agree; in the letter it was "accounts." Of course the corporation have in the usual way two accounts, their current drawing account and their loan account. Mark what

C. A. 1910

REX v. LOCKE.

Buckley L.J.

follows : "The borough accountant produced :—(a) A statement of the amounts payable to the Wilts and Dorset Bank as follows :—Balance of principal in respect of loans, 77,599*l.* 9*s.* 7*d.*" —in that sum is the 600*l.* in question. Then follow a number of other items, and then "(b) A statement of the amounts in the hands of the Wilts and Dorset Bank to the credit of the corporation"; for the purpose, therefore, of what is called the transfer of the banking account, the borough accountant submits a statement of the position of the loans account and a statement of the position of the other account. Then this minute goes on: "Cheques were signed upon the Wilts and Dorset Bank to pay the amounts named in the statement (b) to the credit of the corporation with the National Provincial Bank. Cheques were signed for the amounts named in the statement (a) on the National Provincial Bank payable to the Wilts and Dorset Bank. The town clerk and borough accountant were instructed to attend at the bank and make the transfer of the account." As matter of form, what was done was this: the National Provincial Bank did not pay the Wilts and Dorset Bank this sum, but the town clerk, the mortgagor, paid it; he obviously, as it seems to me upon this statement of facts, paid it by cheque drawn on the National Provincial Bank in order to pay the Wilts and Dorset Bank the 600*l.*, that being part of the machinery for the transfer of the loans account as well as the drawing account from the one bank to the other. I should have thought that was sufficiently plain, but it is made plainer from what follows. This debt was repayable over a period of years. In the two years which had elapsed from 1900 to 1902 the proper instalments had been paid to the Wilts and Dorset Bank. Thereafter during the next years during which the loan was paid off the like amounts were paid to the National Provincial Bank. The debt was treated as being exactly what it had been before, a debt repayable by certain instalments, and those instalments were kept down with the new owner of the debt just as they had been kept down with the previous owner.

Those being the facts, the agreed statement of facts which was supplied to us after the first hearing at our request works it out

C. A. 1910

REX v. LOCKE.

Buckley L.J.

as it seems to me perfectly frankly and fairly. I do not think there is any doubt what the transaction was. Communications passed with the bankers, that is the Wilts and Dorset Bank, and also with the National Provincial Bank, on the subject, with the result that the corporation made arrangements to transfer their banking account to the latter bank, including therein all loans from the former bank. One might criticize the English, but the meaning of the transaction is quite plain: the corporation agree to transfer not their banking account only, but their loans account also. Then they go on to speak of the transfer and as to how the 77,000*l.* was paid to effectuate the transfer, and how the National Provincial Bank afterwards, although the transfer had to be effectuated, expressed a wish not to have the mortgages or transfer of mortgages, as it was not their practice to take mortgages from their corporation customers. The whole result of that transfer to my mind is simply this: that the perfectly legal debt which existed from 1900 to 1902 was transferred from the Wilts and Dorset Bank to the National Provincial Bank, and that this case fails to raise at all the question of what is the effect of s. 233 of the Public Health Act, 1875. This being the state of affairs, I think this appeal must be allowed and the order below discharged; the certiorari must go and the surcharge must be quashed.

KENNEDY L.J. In regard to the decision of the King's Bench Division there appears to me to be a perfectly correct statement in the head-note of the grounds of that decision. (1) [His Lordship read the head-note.] The judgment proceeded entirely upon the ground that in this case the statute had not been followed as it ought to have been followed, because the loan in question, upon the unpaid balance of which the interest in dispute had been paid, was not a loan the repayment of which was secured by a mortgage of the rates or fund. If the view of the meaning of s. 233 which was taken by the King's Bench Division is not justified, the decision falls; and I am of opinion that that view cannot be supported. It is obvious that, in order to maintain it, one must read s. 233 not exactly as it is expressed.

(1) [1910] 2 K. B. 201.

C. A. 1910

REX v. LOCKE.

Kennedy L.J.

It must be admitted by the respondents that it does not say in terms, either with regard to a local authority generally in the first paragraph, or with regard to the urban authority or the rural authority which are discriminated in the two remaining paragraphs, that they shall borrow only upon mortgage. The section permits the local authority generally in paragraph 1, the urban authority particularly in paragraph 2, and the rural authority particularly in paragraph 3, to borrow for certain purposes, and, so far as regards the general clause, it says nothing with regard to mortgage. Dealing with the two classes of authorities separately, after stating that they may borrow or reborrow for certain purposes, it enacts only that they may, for the purpose of securing repayment of sums so borrowed and interest, mortgage to the persons by or on behalf of whom such sums were advanced. It seems to me that, while the word "may" possibly ought in certain connections to be read as of an imperative nature, it is not easy to find any ground for importing an imperative nature into the language of this section. The authority may do certain things, namely, borrow; and they may, for the purpose of securing their lender, mortgage. A forced construction, such as that which the respondents are obliged to contend for, is not prima facie the right construction, and no argument has been addressed to us which seems to me to give sufficient colour to a forced and non-natural construction. It was quite easy, if it had been intended so to legislate, to say "may upon mortgage borrow." The only suggestion why the Legislature should mean to make the borrowing conditional upon a mortgage security—the only reason suggested that seems to me at first sight to have plausibility—was the one which Buckley L.J. has dealt with, namely, the argument about having a register of liabilities to which everybody can refer. As shewn by him, the register ordered by statute would not in this particular case afford much advantage, but I decline to find in a mere advantage that might have accrued had the Legislature chosen to make, by the terms of s. 233, a mortgage an inseparable condition of borrowing any sufficient reason for forcing unnaturally the plain and obvious meaning

of the language used in s. 233. I will add, without basing my judgment upon it, that a perusal of the section seems to me to afford an additional ground, if any were required, for putting the natural meaning upon the language, in the fact that in the first part of s. 233, "any local authority may," &c., "with the sanction of the Local Government Board," which is announcing, as it were, the general policy of the law, there is not a single word about borrowing on mortgage at all. That is the pronouncement of the Legislature as to policy. They then develop it with regard to the urban authority and the rural authority separately. But what I may call the general statement of the policy contains no reference to mortgaging at all. And, further, looking at the particular clauses or portions of that section which deal first with the powers of an urban authority and secondly with the powers of a rural authority, it will be seen that the mortgaging portion is restricted. There may be reasons for that which I do not appreciate and which would explain the framework so as to get rid of the inference, but it is enacted with regard to the urban authority that the mortgage is to be only a mortgage to the persons by or on behalf of whom such sums are advanced. The expression "such sums" refers to the just preceding words, sums which they borrow on the credit of any fund or any rates or rate out of which they are authorized to defray expenses incurred by them in the execution of this Act; whereas the general words of the first portion of the section give local authorities generally a power, with the sanction of the Local Government Board, to borrow or reborrow not only for expenses incurred in the execution of this Act, but for other purposes, for the purpose of defraying any costs, charges, and expenses incurred or to be incurred in the execution of the Sanitary Acts or of this Act or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act, so that the mortgaging power (and the same thing applies to the rural authority), "may mortgage," is limited to one or two only of the general powers to borrow which s. 233 gives them in the earlier and general part.

I am not suggesting that in proceeding upon the one point the Court below were doing anything but what they were

C. A. 1910

REX v. LOCKE.

Kennedy L.J.

practically bound to do, because while the grounds of surcharge stated by the auditor in his certificate include other matters, it appears from the report of the argument in the Court below that it was the question of the alleged illegality of borrowing without mortgage upon which those who sought to support the surcharge were content entirely to base their case. There is, however, in the concluding words of the judgment of the Court pronounced by the Lord Chief Justice a reference to an argument of Mr. Danckwerts on behalf of the present appellants to justify the payment upon the ground that the National Provincial Bank were entitled to stand in the shoes of the Wilts and Dorset Bank and to be treated for the purpose of this surcharge as though they were transferees of the particular mortgage which secured the 600*l.* advanced by the Wilts and Dorset Bank. As to this I only desire to say that in my view the real transaction was not that the National Provincial Bank became transferees of the mortgage. The truth of the transaction, the real gist of it, as the facts now appear, was that the National Provincial Bank became the transferees of a debt previously existing; there was simply a transference of the loan which had been authorized by the Local Government Board and for which a mortgage had been given; the transferees, for some reason which I do not myself understand, unless it was that they thought that taking over the mortgage in some way complicated their business arrangements, in taking a transfer of the debt, or perhaps I should rather say of the loan, in question, chose to say that they would not take the security. Speaking for myself, I fail to see that there is anything in the statute which enacts that, there having been a loan authorized by the Local Government Board and secured to the lender by a mortgage, if the lender himself chooses afterwards to give up the mortgage security for any reason, the loan would become for the future so far a contravention of the statutory power of s. 233 to borrow that there could be a surcharge if interest were paid upon the unsecured loan. If that be so, and if the effect of the transaction with which we are concerned was really a transfer of the loan from the original lender to the National Provincial Bank, I cannot see why that which would not have deprived the transaction of its legal

character in the hands of the original lender should become illegal so as to justify a surcharge when that loan in part has been transferred as it has been to the National Provincial Bank with all the rights, as it appears to me, of their transferors. I think that this appeal must be allowed.

C. A. 1910 REX v. LOCKE.

Appeal allowed.

Solicitors for appellants: *Chester, Broome & Griffithes.*
Solicitors for respondent: *Sharpe, Pritchard & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1910 *Nov.* 28; *Dec.* 19.

SELDON *v.* WILDE.

Solicitor—Costs—Taxation—Default in Delivery of Bill of Costs—Motion for Attachment—Order for Payment of Costs of Motion—Enforcement by Action—Rules of the Supreme Court, Order XLII., *r.* 24.

An order was made by a judge in the Chancery Division that the defendant, a solicitor, should pay to the plaintiff the costs of a motion by the plaintiff for the attachment of the defendant for contempt of Court in not having delivered to the plaintiff a bill of costs pursuant to an order for taxation of costs. The costs of the motion having been taxed, the plaintiff sued the defendant in the King's Bench Division to recover the amount thereof:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the order for costs was not made in a criminal or quasi-criminal matter, and that the action was maintainable.

Judgment of Darling J., [1910] 2 K. B. 9, affirmed.

In re Freston, (1883) 11 Q. B. D. 545, considered.

APPEAL of the defendant from a decision of Darling J. in an action tried without a jury; reported [1910] 2 K. B. 9.

The plaintiff and the defendant were solicitors. On July 28, 1909, the plaintiff obtained in the Chancery Division an order for taxation of the defendant's bills of costs as agent for the plaintiff. The order, which was in the common form, directed delivery of a bill of costs by the defendant to the plaintiff. The defendant made default in delivering to the plaintiff his bills of costs pursuant to the said order, and the plaintiff thereupon gave

C. A. 1910

SELDON v. WILDE.

notice of motion in the Chancery Division for the attachment of the defendant for contempt of Court. The defendant gave notice of motion to set aside the order of July 28. The two motions were heard together by Neville J., who on November 12, 1909, made the following order:—"In the High Court of Justice, Chancery Division. Mr. Justice Swinfen Eady. In the matter of William Wilde, one of the solicitors of the Supreme Court. (Taxation of Costs.) Upon motion this day made unto this Court by counsel for Arthur Frederick Seldon of Barnstaple in the county of Devon solicitor that he might be at liberty to issue a writ or writs of attachment against the above-named William Wilde for his contempt of this Court in making default in delivering to the petitioner Arthur Frederick Seldon a bill of fees and disbursements in all suits causes actions and other matters of business in which he had been employed as the agent for the petitioner Arthur Frederick Seldon pursuant to the order in this matter dated July 28, 1909, and upon motion this day also made unto this Court by counsel for the above-named William Wilde that the said order dated July 28, 1909, might be discharged and upon reading the said order dated July 28, 1909, ... This Court doth not think fit to make any order upon the motion of the said solicitor William Wilde and it is ordered that the said William Wilde do on or before December 3, 1909, deliver to the said Arthur Frederick Seldon his bill of fees and disbursements pursuant to the said order and it is hereby referred to the taxing Master to tax the costs of the said Arthur Frederick Seldon of both the said motions and it is ordered that the said William Wilde do pay to the said Arthur Frederick Seldon the amount of his said costs when taxed." (1)

The plaintiff's costs were taxed at 123*l.* 18*s.*, and the plaintiff brought this action to recover that sum from the defendant. (2) The defendant by his defence alleged that the statement of claim disclosed no cause of action and that the

(1) See *In re Wilde*, [1910] 1 Ch. 100.

(2) It was stated during the argument that execution had been issued by the plaintiff upon the order of Neville J., but had proved abortive; and that the present action was thereupon brought with a view of taking bankruptcy proceedings upon the judgment.

action was an abuse of the process of the Court. Darling J. held that the action was maintainable. The defendant appealed.

Firminger, for the defendant. The action is not maintainable, for it is an action to enforce an order for payment of costs made in a proceeding which is of a criminal or quasi-criminal nature. Disobedience by a solicitor to an order of the Court made against him as an officer of the Court does not give rise to a mere civil liability; such disobedience is contempt of a criminal nature, the proper remedy for which is by attachment: *In re Freston.* (1) The application in the present case was for an attachment, not for the purpose of enforcing a judgment in a civil dispute, but for the purpose of enforcing an order made against the defendant in the exercise of the punitive or disciplinary jurisdiction of the Court against its own officer, and was made in a criminal, or quasi-criminal, matter. The case of *Godfrey* v. *George* (2), which was relied upon by the plaintiff in the Court below, is in the defendant's favour; the proceeding in that case was not a proceeding in the nature of a criminal matter, for an application to strike a solicitor off the rolls had already been held in *In re Hardwick* (3) not to be a proceeding of that nature. The present case falls within s. 4, sub-s. 4, of the Debtors Act, 1869, which excepts the case of a solicitor who has been ordered to pay a sum of money in his character of an officer of the Court making the order from the general abolition of imprisonment for making default in payment of a sum of money. The order was not one for the enforcement of legal rights, but for enforcing the discipline of the Court over its own officer. The order is indivisible, and the costs dealt with under it include not only those of the purely civil proceedings, but also those of the application for attachment; a necessary preliminary to suing upon it would be to obtain its rectification by eliminating so much of it as deals with the costs relating to that application. [He also cited *In re Grey* (4); *Norton* v. *Gregory* (5); *Ivimey* v. *Ivimey.* (6)]

(1) 11 Q. B. D. 545.
(2) [1896] 1 Q. B. 48.
(3) (1883) 12 Q. B. D. 148.
(4) [1892] 2 Q. B. 440.
(5) (1895) 73 L. T. 10.
(6) [1908] 2 K. B. 260.

C. A. 1910

SELDON v. WILDE.

R. H. R. Reeve, for the plaintiff. The action is maintainable. The decision in *In re Freston* (1) does not bind the Court to say that where an application for the attachment of a solicitor results in an order for payment of costs the order is made in a criminal or quasi-criminal matter. In the present case the order is simply one for the payment of money for costs; its effect is to create a civil debt, the proper remedy for which is not by attachment but by action. It is no more than the case of an ordinary litigant being ordered to pay the costs of a motion against him. The case of *Godfrey* v. *George* (2) is really in favour of the plaintiff, and is an a fortiori case; for it was there held that an action would lie on an order that a solicitor should pay the costs of an application to strike him off the rolls, although an unsuccessful attempt had previously been made to attach the solicitor for disobedience to the order. [He also cited *In re Ball* (3); *In re Boyd*. (4)]

Firminger in reply.

Cur. adv. vult.

Dec. 19. BUCKLEY L.J. read the following judgment (5):—In my opinion the plaintiff is entitled to hold the judgment which he has obtained. On July 28, 1909, an order was made at the instance of the plaintiff against the defendant, who is a solicitor, for delivery of his bill of costs. He failed to deliver it, and on November 12, 1909, an order was made by Neville J. upon two motions. The one was a motion by the plaintiff for leave to issue a writ of attachment against the solicitor for his contempt in making default in delivering his bill, and the other a motion by the solicitor to discharge the order of July 28. Upon the latter motion the Court made no order, except as to costs. Upon the former the Court ordered the solicitor on or before December 3, 1909, to deliver to the plaintiff his bill, and the Court ordered the solicitor to pay the costs of both motions. The costs were taxed at 123*l*. 18*s*. On January 11, 1910, the

(1) 11 Q. B. D. 545.
(2) [1896] 1 Q. B. 48.
(3) (1873) L. R. 8 C. P. 104.
(4) [1895] 1 Q. B. 611.

(5) The judgments were delivered in the order in which they are here printed.

plaintiff issued his writ in this action seeking a judgment for the amount of the taxed costs and interest. On February 28 the solicitor delivered a defence admitting the amount to be due under the order, but contending that the statement of claim disclosed no cause of action and that the action was an abuse of the process of the Court. On April 12, 1910, Darling J. gave judgment for the plaintiff. Against that judgment the solicitor appeals.

The appellant contends that the costs which were by the order of November 12, 1909, ordered to be paid were costs incurred in a criminal matter or quasi-criminal matter, and contends that upon this ground no action can be brought upon the order. The question is whether this contention is well founded.

Upon an indictment for a criminal offence it is, I believe, accurate to say that costs can only be given against the defendant under some relevant statute or, since the Costs in Criminal Cases Act, 1908, was passed, under s. 6 of that Act. Sect. 6, sub-s. 1, gives power to the Court to order the person convicted to pay the costs of the prosecution, and s. 6, sub-s. 5, makes the order enforceable in the same manner as an order in civil proceedings. We have not been referred to any authority which decides that the same is true of costs in what have been called quasi-criminal proceedings. The appellant, however, contends that as between civil proceedings and criminal proceedings the proceedings in this case are to be taken as criminal and not civil, and the authority upon which he principally relies for that proposition is *In re Freston.* (1) Before discussing that case I must point out that if it be the true view of that decision that it affirms that proceedings such as those in the present case are criminal proceedings, it results from the subsequent decision in *In re Hardwick* (2) (again one of the Court of Appeal, in which Brett M.R. was again presiding) that the following proposition is true, namely, that if upon proceedings taken against a solicitor the Court strikes him off the roll it is not exercising jurisdiction in a criminal cause or matter, but that if it makes a much less order, namely, that he in his character as solicitor do a particular act, such as delivery up of documents or delivery of a bill of costs, and orders

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 148.

C. A. 1910

SELDON v. WILDE.

Buckley L.J.

his attachment for disobedience, the Court is exercising jurisdiction in a criminal cause or matter. This would be an extraordinary result, and when *In re Freston* (1) is carefully examined, I think that it is not the case. The question in *In re Freston* (1) was not whether the process was criminal or quasi-criminal, but whether it was merely civil. "Is this attachment," said Lindley L.J., "simply in the nature of civil process?" In *In re Freston* (1) an order had on March 14, 1882, been made under the statutory jurisdiction against a solicitor to deliver up certain documents and to pay a certain sum of 10*l.* (which had been paid to the solicitor and was money of the client) and to pay certain costs. The solicitor delivered up the documents, but did not pay the 10*l.* or the costs. Thereupon, on April 19, 1882, an order was made for his attachment for contempt of Court. On April 27, 1882, the writ was delivered to the sheriff for execution. On July 14 the 10*l.* was paid. In October, 1882, the writ of attachment was renewed, and on April 26, 1883, the solicitor Freston was arrested. The question was whether he was entitled to be discharged from custody on the ground of privilege, in that he was arrested when returning to his office from a metropolitan police court where he had been in professional attendance. The Court held that he was not entitled to privilege. Upon a careful examination of the judgments it will be found that the ground upon which the Court held that he was not entitled to privilege was not that the proceedings were criminal, but that they were not simply civil. The ratio decidendi was that privilege extends to protect from attachment in that which is simply in the nature of civil process, but does not extend to protect from attachment which is punitive or disciplinary. The question was as to the cases in which privilege exists. The question was not whether the solicitor ought to be discharged, but whether he had been properly arrested. The decision was that he had been properly arrested because privilege does not exist where the attachment is not mere process to enforce civil rights but is punitive or disciplinary. The decision was founded on the well-known judgment of Lord Brougham in *Wellesley* v. *Duke of Beaufort* (2), where amongst other things Lord Brougham

(1) 11 Q. B. D. 545. (2) (1831) 2 Russ. & My. 639, at p. 666.

says that privilege exists "provided the commitment be not in the nature of punishment but rather in the nature of process to compel a performance," and in which Lord Brougham goes on (1) to refer to *Catmur* v. *Knatchbull* (2) in the following terms: This "was the case of non-performance of an award, made a rule of Court; for non-performance, being a disobedience, was a contempt of the Court, and so might be regarded as technically speaking and in form an offence. But the Court held that as it related simply to a civil matter, and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil; and it refused to commit the defendant, a member of Parliament, for his disobedience."

There are many offences (Lord Brougham has instanced one) which are properly described as offences, but which are not criminal offences. I may instance such a case as *In re Armstrong* (3), a decision of Vaughan Williams L.J. when a judge of first instance. A member of Parliament had refused to submit to examination touching the affairs of a bankrupt. An order was made for his committal. This was an offence, but not a criminal offence. The order consequent upon this offence was not in its nature punitive, but was a civil process to enforce obedience. He was entitled to claim privilege. The learned judge I think drew the right distinction when he said, "The committal, if ordered here, would not be punitive, but merely civil process." Had it been punitive (though not criminal) he would have disallowed privilege. An act of professional misconduct by a solicitor is an offence against his profession. But it is not, or may not be, a criminal offence. Imprisonment is no test of whether proceedings are criminal. Imprisonment is a means employed by the Court to enforce its order in purely civil proceedings. The offence, however, may be one for which punishment can be imposed by an authority which exercises disciplinary jurisdiction, and, if it be such, then privilege does not exist. That seems to me all that *In re Freston* (4) decided. The passages in the judgment most pertinent to the case are as follows:—Brett M.R. at the bottom of p. 553 says:

(1) 2 Russ. & My. at p. 667.
(2) (1797) 7 T. R. 448.
(3) [1892] 1 Q. B. 327.
(4) 11 Q. B. D. 545.

C. A. 1910

SELDON v. WILDE.

Buckley L.J.

"That principle is that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not." He does not say "criminal offences." I agree that Brett M.R. several times in the course of his judgment uses the word "criminal." Neither of the other judges uses the word at all, and Brett M.R. does not, reading his judgment fairly, rest it upon "criminal offence" as distinguished from "offence." The argument of his judgment, and in particular his reference to Lord Brougham's words "provided the commitment be not in the nature of punishment" (see p. 553), shew, I think, that his meaning is not to contrast offences which are criminal or quasi-criminal with offences which are not of that character, but to contrast cases in which committal or attachment is in the nature of punishment with cases in which it is not. Lindley L.J. says: "Is this attachment simply in the nature of civil process? if it is, this solicitor ought to be discharged." A little lower down he relies upon the fact that the solicitor had failed to pay the 10*l.* and was therefore guilty of misconduct, and uses that argument to shew that the attachment was not upon civil process. The judgment of Fry L.J. is very plain. He lays it down in so many words that, where the attachment is punitive or disciplinary, the privilege does not exist. He goes on to point out that, if the attachment had been mere process, Freston could have obtained his discharge ex debito justitiæ on shewing that he had performed what was required by the order (a matter to which Brett M.R. had also pointed attention at p. 554), and says that he could not have done so in the case before the Court, for the Court would have had a jurisdiction to punish him further. And in this context he uses these words: "There was therefore no privilege." *In re Freston* (1) therefore rested, I think, not upon any finding that the offence was criminal or quasi-criminal, but upon a finding that it was an offence which could be visited with consequences resulting not from mere rights to civil process but from rights resting upon a disciplinary jurisdiction. If this be so, then *In re Freston* (1) and *In re Hardwick* (2) are reconciled; for it follows that neither of them affirms that an

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 148.

order under the Solicitors Act as against a solicitor is necessarily criminal or quasi-criminal, whether it be to strike the solicitor off the roll or to order him to do something while remaining on the roll.

This being so, I am not aware of any ground upon which the plaintiff, to whom these costs were by the order of November 12, 1909, ordered to be paid, should be precluded from bringing an action upon that order to obtain a judgment for their payment. He has already, we are told, issued execution and obtained nothing. He says frankly that his object is to obtain a judgment upon which he can found proceedings in bankruptcy. The costs which have been ordered to be paid are partly costs of the application to dismiss the solicitor's summons to discharge the order of July 28. These certainly are not in any view costs in a quasi-criminal matter. But the order cannot, I think, be divided into two parts so as to separate these from the costs of the other application, which was for leave to issue a writ of attachment. In my opinion, however, there is nothing to prevent the plaintiff from suing upon the order so far as the latter costs are concerned. They are costs ordered to be paid to him in a matter in which he applied to the Court to enforce the previous order of July 12, and although that application was made under the statutory jurisdiction and was an appeal to a punitive or disciplinary jurisdiction against the solicitor, the matter was not, I think, one to which any principle applies to the effect that costs in criminal proceedings cannot be enforced by judgment. In my opinion the appeal should be dismissed with costs.

KENNEDY L.J. read the following judgment:—The appellant, William Wilde, was ordered by Swinfen Eady J. in July, 1909, to deliver to his client, A. F. Seldon, the respondent in this appeal, a bill of costs. Wilde did not obey the order. In November Seldon moved the Court (Neville J.) for leave to issue a writ of attachment against Wilde for his contempt of the July order, and Wilde brought on at the same time a cross-motion to discharge the July order. The two motions were heard together, and Neville J. dismissed Wilde's motion, ordered on Seldon's motion that Wilde should deliver to Seldon on or before December 3,

C. A. 1910

SELDON v. WILDE.

Kennedy L.J.

1909, the bill of costs, and further ordered Wilde to pay to Seldon the costs of both motions. These costs were duly taxed and certified and amounted to 123*l.* 18*s.* In January, 1910, Seldon sued Wilde in the King's Bench Division for this sum and interest thereon, and in April, 1910, Darling J. gave judgment in the action in favour of Seldon.

The appeal against this judgment is based by the appellant, Wilde, upon a contention which, broadly stated, is that upon an order made in proceedings of the nature of those in which Neville J.'s order for the payment of costs was made against the appellant an action at common law is not maintainable. It is not disputed that, in general, under Order XLII., r. 24, an action may properly be brought upon the order of a Court or a judge directing costs to be paid by one or other of the parties to a motion, because such an action is a mode of enforcing a judgment within the meaning of Order XLII., r. 24. *Godfrey* v. *George* (1), where Wright J., and, on appeal, the Court of Appeal, held that an action will lie upon an order of the Court by which a solicitor is ordered to pay the costs of an application to strike him off the rolls, affords an illustration of this general rule. On the other hand, it is not disputed, I think, that, subject to the special provisions of the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 6, sub-s. 5, an order to pay costs made in a matter which is in the nature of a criminal matter is not enforceable by a civil action. This was recognized in the judgments of all the members of the Court of Appeal in *Godfrey* v. *George* (1), to which I have just referred. The question, therefore, which we have to decide is whether this order of November 12, 1909, was or was not, in the language of Lord Esher M.R., "made in a matter which was in the nature of a criminal matter." (2)

The authority chiefly relied upon by the appellant is the decision of this Court in 1883 in the case of *In re Freston.* (3) The question argued in that case was whether one Freston, a solicitor, against whom Denman J. had made an order for the issue of a writ of attachment and who had been arrested

(1) [1896] 1 Q. B. 48. (2) [1896] 1 Q. B. at p. 50.
(3) 11 Q. B. D. 545.

thereunder, was, in certain circumstances which it is unnecessary to recapitulate, privileged from arrest. The judgment of the Court of Appeal that the solicitor was not privileged from arrest was based upon the ground that the attachment under the order of the Court in that case was not mere civil process, but—whether called "disciplinary" or "punitive"—partook of a criminal nature. I agree with the appellant's counsel that, if the process here, like that in *In re Freston* (1), partook of a criminal nature, this appeal must be allowed. But it is not every process in which the Court makes an order against a solicitor in the exercise of its disciplinary jurisdiction over him as an officer of the Court which partakes of a criminal nature. *In re Hardwick* (2) and *Godfrey* v. *George* (3) are clear decisions of the Court of Appeal to the contrary. In both the disciplinary jurisdiction of the Court had been invoked against a solicitor, and an order had been made against the solicitor as an officer of the Court, but it was held in the first case that the matter was not a criminal cause or matter within s. 47 of the Judicature Act, 1873, and in the second that an action might be maintained by a person to whom the solicitor, on an application to strike him off the rolls, had been ordered to pay costs, for the recovery of such costs. In the course of his judgment in *Godfrey* v. *George* (4) Lord Esher M.R. said: "No doubt he could be attached for such disobedience, because the order was made against him in the exercise of the disciplinary jurisdiction of the Court over him as its officer. It does not, however, follow that, because he could be attached, therefore an action will not lie against him on the order." In my judgment the true view is that where, as in *In re Freston* (1), the order for attachment has been made, under which the solicitor may be imprisoned and cannot claim release ex debito justitiæ upon doing the acts commanded, the disciplinary process has ceased to be merely civil, but has so far acquired a criminal nature that a civil action, based upon part of the order of attachment, cannot be maintained by the party to whom money, in the shape of costs or otherwise, has become payable under that order. But, until that stage has been

(1) 11 Q. B. D. 545.
(2) 12 Q. B. D. 148.
(3) [1896] 1 Q. B. 48.
(4) [1896] 1 Q. B. at p. 51.

C. A. 1910

SELDON v. WILDE.

Kennedy L.J.

reached, proceedings against a solicitor, whether to strike him off the rolls or to order him to deliver a bill of costs, although truly of a disciplinary character, inasmuch as they supply a peculiar method of redress wherein the jurisdiction of the Court is invoked against a solicitor as an officer of the Court, remain essentially civil proceedings, so that an order of the Court for the payment of costs is an order which may be enforced by civil action.

In *In re Freston* (1) the question of privilege arose in regard to execution of an order of attachment. In *In re Hardwick* (2) and in *Godfrey* v. *George* (3) there was no order of attachment. The process in those two last-mentioned cases might have taken that course, as Lord Esher points out in the passage I have quoted, but in fact it had not done so; and this is the position of affairs in the present case. There were, as I have already said, cross motions, the one to issue a writ of attachment against Wilde, the other by Wilde to discharge the order which had been made against him for the delivery of his bill of costs to his client. The learned judge refused to order the writ of attachment to issue. If he had so ordered, the process, so far as regards the enforcement of any part of that order, would thereupon have become one of a criminal nature, as in *In re Freston* (1), and if he had in such an order been directed to pay costs, an action to recover those costs could not have been maintained. But, instead of making an order for the issue of a writ of attachment, the learned judge made the order which, in regard to the payment of costs by Wilde, the respondent has sought to enforce by civil action. I think that he is entitled so to do, because, as the matter stands, it is still one of a civil nature. The stage at which the disciplinary process against Wilde would become process of a criminal nature has not been reached. I can apply to the present case the language of Brett L.J. in *In re Hardwick* (2), pronouncing the judgment of the Full Court of Appeal, "the jurisdiction exercised in these matters by the High Court is a disciplinary jurisdiction over its own officers, and not a jurisdiction in any criminal cause or

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 148.
(3) [1896] 1 Q. B. 48.

matter." Therefore the action brought by the present respondent upon the order of Neville J. is in my judgment maintainable, and the judgment of Darling J. in his favour was right, and this appeal should be dismissed.

C. A. 1910

SELDON v. WILDE.

VAUGHAN WILLIAMS L.J. read the following judgment:—I think it right to deliver my dissenting judgment at some length, because I think the scope and object of the peculiar jurisdiction exercised by the High Court over solicitors are important matters for our consideration.

As I understand the judgments in the case of *In re Freston* (1), the judgments in that case turned, and the judgments in that class of cases turn, upon the question whether the process put in force is process to compel or enforce obedience to the order of the Court or to punish disobedience. I think that the principle of *In re Freston* (1) applies whenever the offence is criminal or quasi-criminal, i.e., to be accurate, not criminal although in the nature of an offence against the law. Lord Esher in his judgment in the case of *In re Freston* (2) says: "The moment you shew that the attachment has issued for a breach of the law, or for an act or omission in the nature of an offence against the law, then no privilege can be claimed. If so, then the question in this case is whether, when an order has been made by the Court upon a solicitor in his character of solicitor, by virtue of a power which the Court has over him by reason of his being a solicitor, the disobedience to that order is an offence of a criminal nature, or merely renders him liable to civil process." Lord Esher then sets forth the peculiar power of the Court with regard to solicitors exercised before the passing of the Debtors Act, 1869, and speaks of it as disciplinary authority over them in respect of acts done by them in their character of solicitors, and then says, "Therefore, it seems to me that the moment you use the words discipline and duty in this sense, it directly follows that the breach of these is in its nature an offence," and points out that it was the recognition of this principle which led to the power of arrest being retained

(1) 11 Q. B. D. 545.

(2) The citations from the judgment of Lord Esher M.R. are taken from the report in 49 L. T. 290.

C. A. 1910

SELDON v. WILDE.

Vaughan Williams L.J.

against solicitors, and says, "Apart from this principle there could be no reason for excepting solicitors from the abolition of arrest for debt." Lord Esher goes on to point out that in the case of such a disciplinary order obedience does not necessarily entitle him to be released ex debito justitiæ, and says, "He (the solicitor) must apply to the Court for an order to release him, and whether, as a matter of practice, that order could be made as of course or not, yet it seems to me that it is more than a mere process, because the solicitor can always be ordered to pay the costs of the application." Lord Esher in his judgment likens the arrest of the solicitor in that case to an arrest on a criminal charge rather than an arrest for the purpose of enforcing a judgment in a civil suit. He does not say it is an arrest on a criminal charge. He, moreover, does describe the attachment as being for a breach of the law and for an offence, and comes to the conclusion that the order (i.e., the order to deliver up certain deeds and to pay 10*l.* and costs) was an order made by the Court upon a solicitor in his character of a solicitor, and that disobedience to the order was in the nature of an offence. This means, I think, that, as the process of attachment in this case was a process for the punishment of an offence and not process to enforce a judgment upon a civil dispute between the parties, it must be regarded as punishment of the solicitor awarded under the peculiar disciplinary power of the Court over its officers for breach of duty.

I do not find that Lindley L.J. and Fry L.J. take any different view. It is true that they do not in words liken arrest on a disciplinary attachment of a solicitor as an officer of the Court for breach of duty to an arrest upon a criminal charge, but they do clearly treat the process as punitive—as punishment by imprisonment for an offence—and the reference to the language of s. 4, sub-s. 4, of the Debtors Act, 1869, indicates that they did not substantially differ from the view expressed by the language of Lord Esher.

The case of *In re Dudley* (1) expressly followed the decision in *In re Freston* (2) and held that the solicitor was liable to be attached by the Court in the exercise of its punitive jurisdiction

(1) (1883) 12 Q. B. D. 44. (2) 11 Q. B. D. 545.

over the officer of the Court, although the disobedience was of an order for the payment of a debt, since the order was an order made against him as a solicitor for not acting in good faith.

I agree that the result of the cases of *In re Freston* (1) and *In re Dudley* (2) is not that every disciplinary order is of necessity an order made in respect of a criminal offence—the offence may be, as Lord Esher calls it, a quasi-criminal offence, in other words something less than a criminal offence or more than a mere civil offence—or an offence which does not involve or incur punishment, as when the result of dishonest or improper conduct by a solicitor in his character of a solicitor is not that he is punished by arrest and imprisonment, but that he is struck off the rolls : see *In re Hardwick.* (3)

It may properly then be asked why an action may not be brought on an order of a disciplinary character made against a solicitor as such by a Court in the exercise of its peculiar power over its officers. The answer to my mind is that, whenever the Court has ordered attachment of the solicitor for disobedience of such order, i.e., has ordered arrest and imprisonment as a punishment for such disobedience, the solicitor so punished cannot ex debito justitiæ claim release from imprisonment upon rendering obedience to the order ; he must, says Lord Esher in the passage which I have quoted, "apply to the Court for an order to release him, and whether as a matter of practice that order could be made as of course or not, yet it seems to me that it is more than a mere process because the solicitor can always be ordered to pay the costs of the application." The case of *Godfrey* v. *George* (4), in which it was held that the remedy by action and the remedy by order of the Queen's Bench Division for attachment were concurrent remedies for the enforcement of payment of the same costs, has no application to the present case, first, because in that case the application to the Queen's Bench Division was to strike the solicitor off the rolls, and the order, if made, would not have been by way of punishment by imprisonment for breach of the law: *In re Hardwick* (3); and, secondly, because no order of a punitive character was made, but

(1) 11 Q. B. D. 545.
(2) 12 Q. B. D. 44.
(3) 12 Q. B. D. 148.
(4) [1896] 1 Q. B. 48.

C. A. 1910

SELDON v. WILDE.

Vaughan Williams L.J.

only a consent order for the payment of certain costs to recover which the action was brought, which was held to have been well brought, by Godfrey as the assignee of Wood of all moneys due from the defendant to Wood, in whose favour the consent order had been made on the hearing of the Master's report on an application to strike defendant off the roll, on the terms that defendant should pay certain admitted debts and the costs of the application by Wood to strike defendant off the roll. I do not think that the Court would have held that there was a concurrent remedy by action, if the order for the payment of costs was made by the Court in the exercise of its disciplinary jurisdiction as a punishment for misconduct as a solicitor. I do not think that an action can be brought on such an order, i.e., an order to punish a solicitor for contempt in disobeying an order of the Court, as distinguished from an order to enforce obedience to the order of the Court. It is to be remembered that this disciplinary jurisdiction may be put in motion not only by the person to whom the money is ordered to be paid, but by any other person. Prima facie it seems improbable that Order XLII. and the rules thereunder could have been intended to allow any one to enforce by action an order not intended to compel or enforce payment but to punish for non-payment.

There is, however, an argument in favour of holding the action in this case to be maintainable, which is set forth in the judgment of Kennedy L.J., which he has allowed me to read, and briefly it is this, that in the present case there is no attachment order, only an order for payment of costs. Such costs, however, are part of the punitive order, and I cannot differentiate the case from a case in which attachment is ordered.

Appeal dismissed.

Solicitors for plaintiff: *Church, Rendell & Co.*
Solicitor for defendant: *William Wilde.*

W. J. B.

THE GUARDIANS OF THE POOR OF THE CALNE UNION *v.* THE WILTS COUNTY COUNCIL.

1910
Nov. 4.

Local Government—Local Grants—Maintenance of Pauper Lunatics—Sums payable by County Council to Poor Law Guardians—Date of Accrual of Cause of Action—"Period of maintenance"—Net Charge upon Guardians equal to or exceeding 4s. a week—Deduction of Sums received by Guardians from Source other than Rates—Sums received after Period of Maintenance—Money had and received to Use of County Council—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-s.* 2 (*f*); *s.* 80.

By ss. 20, 21, and 23 of the Local Government Act, 1888, the duties on local taxation licences and a portion of the probate duties are to be paid to the council of each county and by them paid into the county fund.

By s. 24, sub-s. 1, the annual grants made out of the Exchequer in aid of local rates (called local grants) are to cease; and by sub-s. 2, "In substitution for local grants, the council of each county shall from time to time . . . . pay out of the county fund . . . . the following sums, that is to say . . . . (*f*) They shall pay to the guardians of every poor law union wholly or partly in the county a sum equal to four shillings a week for each pauper lunatic chargeable to that union, and maintained in an asylum, registered hospital, or licensed house, for whom the net charge upon the guardians, after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates, is equal to or exceeds four shillings a week throughout the period of maintenance for which the sum is so paid."

By s. 80, all payments out of the county fund shall be made by the county treasurer in pursuance of an order of the council, and no such order shall be made by the council except in pursuance of a resolution of the council passed on the recommendation of the finance committee.

The "period of maintenance" of pauper lunatics chargeable to the poor law unions in a county was fixed by the practice adopted by the county council and the guardians as the twelve months ending on September 30 in each year. A pauper lunatic was maintained by the guardians of a union from 1902 until her death in May, 1907. In respect of each of the four years ending September 30, 1907, the county council paid to the guardians a sum equal to 4*s.* a week towards the cost of the pauper lunatic's maintenance during the year. By an order of the county court in 1902, made under s. 132 of the Lunacy Act, 1890, a sum of money to which the lunatic was entitled was vested in the clerk to the guardians to be applied to the maintenance of the lunatic or in reimbursement of moneys from time to time expended by the guardians for her maintenance as the judge might from time to time direct. No application was made to the Court for payment of any part of this sum towards the lunatic's maintenance until after her death,

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

when an order was made for payment to the guardians of a sum equal to the total cost of her maintenance during the whole time she was maintained by the guardians. The county council claimed to recover from the guardians as money had and received to their use a sum equal to the amount which they had paid to the guardians towards the cost of the lunatic's maintenance during the four years ending September 30, 1907. The guardians contended that the accounts for those years had been closed and settled at the end of each year, and that therefore the claim would not lie:—

Held, that the county council were entitled to recover the amount claimed as money had and received to their use.

During the year ending September 30, 1908, the guardians of a union received from a source other than local rates towards the cost of maintenance of a pauper lunatic during the preceding year a sum of money which had not been brought into the accounts of that year. The county council claimed that this sum should be deducted from the cost of maintenance of the pauper lunatic during the year in which it was actually received so as to arrive at the net charge upon the guardians for the maintenance of the pauper lunatic during that year:—

Held, that the claim of the county council was right.

The accounts of the guardians for the year ending September 30, 1909, shewing a sum to be due from the council to the guardians in respect of the cost of maintenance of pauper lunatics during that year, were lodged with the county council on December 1, 1909. The next meeting of the council after December 1, 1909, was on February 16, 1910, and that was followed by a meeting on March 16. There were in the county nineteen poor law unions whose accounts had to be examined by the council, and the examination would take some weeks. The finance committee at a meeting on February 22, 1910, passed the accounts, and the council at their meeting in March made an order for payment of the amount due, and the amount was paid. The guardians in the meantime brought an action on January 31, 1910, against the council to recover the amount appearing on the accounts to be due:—

Held, that the amount did not become payable until the necessary time had elapsed to make the payment by the county council lawful, that is to say, until the council had a reasonable time to examine the accounts and until after the meetings of the finance committee and the council, and that therefore no cause of action had arisen when the action was commenced.

TRIAL of action before Hamilton J. without a jury.

The action was brought under s. 24, sub-s. 2 (*f*), of the Local Government Act, 1888 (1), to recover the balance alleged to be

(1) 51 & 52 Vict. c. 41, s. 24: "Whereas certain grants heretofore made out of the Exchequer in aid of local rates (in this Act referred to as local grants) will, by reason of the duties on the local taxation licences

due in respect of the maintenance of pauper lunatics during the two years ending respectively on September 30, 1908, and September 30, 1909. (1) The claim for the year ending September 30, 1908, amounted, so far as material, to 47*l.* 17*s.* 1*d.*, and that for the year ending September 30, 1909, amounted to 164*l.* 10*s.* 3*d.*

With regard to the claim for 47*l.* 17*s.* 1*d.* for the year ending September 30, 1908, the sum of 10*l.* 9*s.* 1*d.*, part thereof, was claimed in respect of the cost of maintenance of a pauper lunatic named Mary Ann Trembling, who became chargeable to the union on April 17, 1906. The total cost of her maintenance for the year ending September 30, 1908, amounted to 24*l.* 15*s.* 7½*d.* At various dates during that year the plaintiffs received from a trustee of a fund to which the lunatic was entitled sums amounting to in all 15*l.* 12*s.* 1*d.* The first of such payments, amounting to 5*l.* 4*s.* 1*d.*, which is the only one material to this case, was received on December 10, 1907, under an order of the county court made upon a petition dated November 9, 1907, and presented by the plaintiffs under s. 132 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and the sum was claimed and ordered to be paid in respect of the cost of the lunatic's maintenance during the year ending

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and the probate duty grant being by this Act made payable to local authorities, cease, it is therefore hereby enacted as follows :—

. . . .

"(2.) In substitution for local grants, the council of each county shall from time to time . . . . pay out of the county fund and charge to the Exchequer Contribution Account the following sums, that is to say . . . .

"(*f*) They shall pay to the guardians of every poor law union wholly or partly in the county a sum equal to four shillings a week for each pauper lunatic chargeable to that union, and maintained in an asylum, registered hospital, or licensed house, for whom the net charge upon the guardians, after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates, is equal to or exceeds four shillings a week throughout the period of maintenance for which the sum is so paid."

(1) The "period of maintenance" mentioned in s. 24, sub-s. 2 (*f*), of the Act of 1888 was fixed by the practice of the guardians of the unions in the county and the county council as the twelve months ending on September 30 in each year.

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

September 30, 1907. The plaintiffs contended that, though this sum of 5*l.* 4*s.* 1*d.* was received by them during the year ending September 30, 1908, inasmuch as it was received in respect of the cost of maintenance of the lunatic during the preceding year, and inasmuch as the accounts between the plaintiffs and the defendants in relation to the sums payable under s. 24, sub-s. 2 (*f*), of the Act of 1888 in respect of that year, in which alone it could have been deducted, had been settled and closed, it could not be deducted from the total cost of maintenance so as to arrive at the net charge upon the guardians during the year ending September 30, 1908. If this sum were excluded from the sum to be deducted, the sum of 10*l.* 8*s.* only would have to be deducted from the 24*l.* 15*s.* 7½*d.*, leaving the net charge for maintenance of the pauper lunatic at 14*l.* 7*s.* 7½*d.*, a sum exceeding 4*s.* a week during the year. In this event the defendants would be liable under s. 24, sub-s. 2 (*f*), of the Local Government Act, 1888, to pay to the plaintiffs the sum of 10*l.* 9*s.* 1*d.* claimed in respect of the cost of the pauper lunatic's maintenance during the year, being a sum calculated at the rate of 4*s.* a week. If on the other hand, as the defendants contended, this sum of 5*l.* 4*s.* 1*d.* ought to be included in the sum to be deducted, the net charge for maintenance during the year would be reduced to 9*l.* 3*s.* 6½*d.*, a sum less than 4*s.* a week.

With regard to the claim for 37*l.* 8*s.*, the balance of the claim for 47*l.* 17*s.* 1*d.* in respect of the year ending September 30, 1908, the defendants claimed to set off the sum of 37*l.* 8*s.* against that part of the claim and counterclaimed for it in the following circumstances. A pauper lunatic, named Sarah Hawkins, chargeable to the Calne Union, was maintained by the plaintiffs in an asylum from October 18, 1902, until her death on May 2, 1907. The defendants paid to the plaintiffs, under s. 24, sub-s. 2 (*f*), of the Act of 1888, in respect of the cost of her maintenance the following sums, being at the rate of 4*s.* a week: 10*l.* 8*s.* 7*d.* for each of the years ending September 30, 1904, 1905, and 1906, and 6*l.* 2*s.* 3*d.* for the part of the year to May 2, 1907, those sums amounting to 37*l.* 8*s.* The lunatic was entitled to a sum of 159*l.* 3*s.* 4*d.* in the Post Office Savings Bank, and on December 12, 1902, upon the petition of the guardians under s. 132 of the Lunacy Act, 1890, an order was

made in the county court authorizing the clerk to the guardians to take possession of this sum and to receive the same as the personal property of the lunatic, and to exercise all the powers which could be exercised by the legal personal representative if she were dead, and, after paying certain costs and charges, that the balance should be invested and applied to the maintenance and benefit of the lunatic or in reimbursement of the moneys from time to time expended by the guardians for the care, relief, or maintenance of the lunatic in such manner as the judge might from time to time direct. No application was made for payment of any part of this sum towards the lunatic's maintenance until after her death, when a petition was presented by the plaintiffs on July 26, 1907, and an order was made by the county court on September 20, 1907, authorizing the payment to them of the sum of 120*l.* 2*s.* 6*d.*, being the total cost of maintenance of the pauper lunatic during the whole time she was maintained by the plaintiffs in the asylum, and this sum was paid to the plaintiffs on October 8, 1907. The defendants alleged that in consequence thereof there was no net charge upon the plaintiffs for the maintenance of the lunatic, and they claimed to be entitled to recover from the plaintiffs as money had and received to their use a sum equal to the 37*l.* 8*s.* paid by them to the plaintiffs. The plaintiffs alleged that the accounts between the plaintiffs and the defendants in relation to the sums payable under s. 24, sub-s. 2 (*f*), of the Act of 1888 in respect of each of the periods of maintenance ending on September 30 in each year had been settled and closed, and the defendants were not entitled to the set-off claimed or to maintain the counter-claim.

With regard to the claim in respect of the year ending September 30, 1909, the defendants in their defence alleged that no sum was payable by them to the plaintiffs in respect thereof at the date of the commencement of the action, such sum not being in law payable before the end of the current financial year, namely, March 31, 1910. The plaintiffs in their reply alleged that the sums payable to them by the defendants under s. 24, sub-s. 2 (*f*), of the Act were in law due and payable on September 30 in each year or so soon thereafter as the claim therefor had been delivered to the defendants. The facts as to

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

this were that on December 1, 1909, the plaintiffs lodged with the defendants the accounts for the year ending September 30, 1909, shewing the claim for 164*l.* 10*s.* 3*d.*; that the writ in the action was issued on January 31, 1910; that the first meeting of the county council after December 1, 1909, was held on February 16, 1910, and the next meeting after that was held on March 16, 1910. (1) Since the year 1898 the defendants, in lieu of the former practice of paying the annual pauper lunatic grant in one sum at some date after the delivery of the guardians' claims, adopted the practice of paying an instalment after the August meeting of the council, and the balance after the February or March meeting of the council, but there was no

(1) By s. 75 of the Local Government Act, 1888, the provisions of Sched. II. to the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), are applied to county councils; and by that schedule, as amended in the case of county councils by s. 1 of the County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), and s. 2 of the County Councils (Elections) Amendment Act, 1900 (63 & 64 Vict. c. 13), a county council is obliged to hold four quarterly meetings in each year, the first, in the year of the election of councillors, on March 16 or on such other day within ten days after the ordinary day of retirement of county councillors as the council may from time to time fix, and in other years on such day in March, April, or May as the council shall from time to time determine; and the others on such other three days as the council decide or from time to time by standing order determine. The Wilts County Council by standing order fixed the meetings of the council to be held on March 16, the third Tuesday in May, the first Tuesday in August, and the third Wednesday in November, and a special meeting on the third Wednesday in February, in every year.

By ss. 71 and 73 of the Local Government Act, 1888, the accounts of the receipts and expenditure of a county council shall be made up to the end of each local financial year, namely, March 31. By s. 80, sub-s. 1, all payments out of the county fund shall be made by the county treasurer, and shall be made in pursuance of an order of the council signed by three members of the finance committee present at the meeting of the council and countersigned by the clerk of the council; and by sub-s. 3, every county council shall appoint a finance committee for regulating and controlling the finance of the county, and an order for the payment of a sum out of the county fund shall not be made by a county council except in pursuance of a resolution of the council passed on the recommendation of the finance committee.

By s. 23, sub-s. 1, all sums received by a county council in respect of the duties on local taxation licences and the probate duties shall be paid to the county fund and carried to a separate account called the Exchequer Contribution Account.

admission of any legal liability to make the payment in this manner. Evidence was given by the defendants' accountant that there were nineteen poor law unions in Wiltshire, and that the examination by the defendants of the accounts of the unions occupied several weeks; that the examination of the accounts lodged by the plaintiffs, as well as those of some other unions, was not completed in time for the meeting of the finance committee of the county council on January 25, 1910, and the accounts were presented to and passed by the finance committee on February 22, and at the meeting of the county council on March 16 an order was made for payment to the plaintiffs of the sum of 162*l.* 18*s.* 10*d.*, part of the said sum of 164*l.* 10*s.* 3*d.* claimed, and on March 19 this sum was paid to the plaintiffs, thus satisfying the plaintiffs' claim for the year ending September 30, 1909, except as to 1*l.* 11*s.* 5*d.*

The defence further alleged with regard to the claim for the year ending September 30, 1909, that, if any sum was due at the date of the commencement of the action, the defendants were entitled to set off against it the above-mentioned sum of 1*l.* 11*s.* 5*d.*, and they counterclaimed for that amount. The facts in relation to this matter were these. One Sarah Godwin Rawlings, a pauper lunatic chargeable to the Calne Union, was maintained in an asylum from August 7, 1908, to March 31, 1909, and the defendants paid to the plaintiffs the sum of 1*l.* 11*s.* 5*d.*, being equal to 4*s.* a week for the period from August 7 to September 30, 1908, towards the cost of her maintenance. On July 23, 1909, the plaintiffs received from the lunatic's father, who was liable to contribute towards her maintenance, the sum of 15*l.* 12*s.* 3*d.*, being the total amount of the cost of her maintenance for the period from August 7, 1908, to March 31, 1909, there being thus no net charge upon the plaintiffs in respect thereof. The defendants claimed to be entitled to recover from the plaintiffs as money had and received to their use a sum equal to the 1*l.* 11*s.* 5*d.* paid by them to the plaintiffs. The plaintiffs in their reply alleged that the sum of 1*l.* 11*s.* 5*d.* was properly paid to them by the defendants in respect of the maintenance of the lunatic during part of the period of maintenance ending on September 30, 1908, and that

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

the accounts between them and the defendants in relation to the sums payable under s. 24, sub-s. 2 (*f*), of the Act of 1888 in respect of that period had been settled and closed; that no claim was made against the defendants for her maintenance during the year ending September 30, 1909; and that the defendants were not entitled to set off or counterclaim for the said sum.

Macmorran, K.C., and *T. R. Colquhoun Dill*, for the plaintiffs. By ss. 20—23 of the Local Government Act, 1888, in lieu of the annual parliamentary grants which were made in aid of local rates, the duties on the local taxation licences and part of the probate duties are made payable to the county council, and by s. 24 the county council are to pay certain sums to the local authorities within their area. Among other payments the county council have, by s. 24, sub-s. 2 (*f*), to pay to the guardians of every poor law union within their area a sum equal to 4*s.* a week for each pauper lunatic chargeable to the union and maintained in an asylum, registered hospital, or licensed house, for whom the net charge upon the guardians, after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates, is equal to or exceeds 4*s.* a week throughout the period of maintenance for which the sum is so paid.

The first question arises with regard to the claim for 10*l.* 9*s.* 1*d.* in respect of the cost of maintenance of the pauper lunatic Trembling during the year ending September 30, 1908. The sum of 5*l* 4*s.* 1*d.* received by the plaintiffs in that year in respect of the cost of the lunatic's maintenance during the preceding year cannot be deducted from the sum of 24*l.* 15*s.* 7½*d.*, the total cost of her maintenance for the year ending September 30, 1908. There is no special period fixed by s. 24 of the Act as "the period of maintenance." It is left to the local authorities to fix it, and the parties here have fixed it as the twelve months ending on September 30 in each year. Each period of maintenance is separate and distinct, and the accounts of the receipts and payments for each period are made up and settled at the end of that period The "net charge" upon the guardians

must be the net charge during the particular period of maintenance. These payments which the county council have to make to local authorities are, as stated in s. 24 of the Local Government Act, 1888, in substitution for the annual parliamentary grants, which were voted each year in relief of the rates for the year. The ratepayers of each year ought to bear the burdens of that year. If the defendants' contention is correct, the ratepayers of to-day may have to pay part of the cost of the maintenance of pauper lunatics during preceding years. This would be inequitable. The "amount received" by the guardians, which by s. 24, sub-s. 2 (*f*), of the Act of 1888 must be deducted from the total cost of maintenance, must be a sum received during the particular period of maintenance. By ss. 71, 73, and 74 of the Act the financial year of the county council is the year ending March 31, and the accounts of the receipts and expenditure of the county council are made up to that date. That, however, does not affect the "period of maintenance" specified in s. 24, sub-s. 2 (*f*). The 5*l.* 4*s.* 1*d.* having been received in respect of the maintenance of the lunatic during the year ending September 30, 1907, and the accounts for that year having been closed and settled, that sum cannot be brought into the accounts of the following year. It would introduce confusion into the accounts to do so. It cannot be deducted from the total cost of main tenance of the pauper lunatic for the year ending September 30 1908, and consequently the net charge upon the plaintiffs for her maintenance during the year exceeds 4*s.* a week, and the plaintiffs are entitled to recover the sum of 10*l.* 9*s.* 1*d.*

Next, with regard to the claim for 37*l.* 8*s.*, the balance of the claim for the year ending September 30, 1908, the defendants are not entitled to set off the sum of 37*l.* 8*s.* or to counterclaim for it as money had and received to their use. The defendants paid the various sums, amounting in all to 37*l.* 8*s.*, to the plaintiffs in respect of the cost of maintenance of the pauper lunatic Hawkins for the four years ending September 30, 1907. The 120*l.* 2*s.* 6*d.* was received by the plaintiffs from the lunatic's estate during the year ending September 30, 1908, in respect of the cost of her maintenance in the asylum from 1902 until her death in May, 1907. The plaintiffs incurred no cost for her

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

maintenance during the year ending September 30, 1908, and make no claim against the defendants in respect thereof. The accounts of the previous years, as has been already pointed out, have been finally closed and settled, and the defendants are not entitled to reopen them. The 120*l.* 2*s.* 6*d.*, which was received by the plaintiffs after the close of the period of maintenance, was a windfall for the ratepayers of the union and will go in reduction of rates. The defendants cannot, because the plaintiffs have received that sum from the lunatic's estate after the close of the period of maintenance, claim to reopen the accounts for the previous years and to recover 37*l.* 8*s.*, part thereof, as money had and received to their use.

With regard to the claim for the year ending September 30, 1909, the defendants cannot set off or counterclaim for the sum of 1*l.* 11*s.* 5*d.* That sum having been received by the plaintiffs after the period of maintenance stands upon the same footing as the above-mentioned sum of 37*l.* 8*s.*, and the same considerations apply to both these sums.

Lastly, with regard to the defence that at the date of the commencement of the action no sum was payable in respect of the year ending September 30, 1909, the debt accrues due from the defendants as soon as the plaintiffs have paid the cost of maintenance and as soon as the period of maintenance has ended. A cause of action arises then.

C. A. Russell, K.C., and *T. H. Parr*, for the defendants. First, with regard to the claim for the cost of maintenance of the pauper lunatic Trembling during the year ending September 30, 1908, the plaintiffs in fact received sums amounting to 15*l.* 12*s.* 1*d.* from her estate during that year. The fact that 5*l.* 4*s.* 1*d.*, part of this sum, was received in respect of the cost of her maintenance during the year ending September 30, 1907, does not prevent it from being deducted so as to arrive at the net cost of maintenance during the year in which it was received. By s. 24, sub-s. 2 (*f*), in order to entitle the plaintiffs to recover from the defendants a sum equal to 4*s.* a week for each pauper lunatic maintained by them, the "net charge" upon the plaintiffs, after deducting "any amount received by them for the maintenance of such lunatic" from any source other

than local rates, must be equal to or exceed 4*s.* a week throughout the period of maintenance. The words are perfectly general and include any amount actually received during the period. If that were not the true meaning of the enactment, the guardians might, by delaying to claim against a person liable to contribute towards the maintenance of the pauper lunatic until after the close of the period of maintenance, be entitled to receive from the county council a sum equal to 4*s.* a week, when if they had claimed in proper time they would not have been entitled to anything. The defendants are therefore entitled to deduct the sum of 5*l.* 4*s.* 1*d.* so as to arrive at the "net charge" on the plaintiffs for the cost of the lunatic's maintenance during the year ending September 30, 1908, and the net charge is thus reduced below 4*s.* a week.

With regard to the sums of 37*l.* 8*s.* and 1*l.* 11*s.* 5*d.*, the defendants are entitled to recover them as money had and received to their use. In the case of Hawkins, between the year 1902 and her death in 1907 no application was made by the plaintiffs for payment out of the fund of any sum for her maintenance during those years. The plaintiffs, instead of applying from time to time as the charges for her maintenance accrued due, waited until after her death, and then applied for and obtained an order for payment of the total cost of her maintenance during the whole of those years. Inasmuch as the defendants have paid to the plaintiffs sums of money in respect of her maintenance during those years, the defendants are ex æquo et bono entitled to recover the amount of those sums from the plaintiffs as money received to their use: *Moses* v. *Macferlan* (1); *Jacobs* v. *Morris* (2); Leake on Contracts, 3rd ed., p. 70. In the case of Rawlings the same principle is applicable. In both cases the plaintiffs received the money on the defendants' behalf. There is such a relation constituted between the guardians and the county council that, if the guardians recover either against the pauper lunatic's estate or against a person liable to maintain the pauper lunatic the cost of the pauper lunatic's maintenance, the guardians must be considered as having received for the county council a sum equal to the

(1) (1760) 2 Burr. 1005, at p. 1010. (2) [1901] 1 Ch. 261, at p. 268.

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

amount already paid by the county council to the guardians for such maintenance. The defendants therefore are entitled to the two sums of 37*l.* 8*s.* and 1*l.* 11*s.* 5*d.*

There remains the defence with reference to the plaintiffs' claim for the year ending September 30, 1909, that no sum at all was payable at the date of the commencement of the action. The defendants hold four quarterly meetings each year, the first being held on March 16, and a special meeting on the third Wednesday in February. By s. 23, sub-s. 1, of the Act of 1888 all sums received by a county council in respect of the duties on local taxation licences and the probate duties must be paid into the county fund and carried to a separate account called the Exchequer contribution account. By s. 80, sub-ss. 1, 3, a county council must appoint a finance committee, and all payments out of the county fund have to be made in pursuance of an order of the council signed by three members of the finance committee present at the meeting of the council and countersigned by the clerk of the council, and an order for payment can only be made in pursuance of a resolution of the council passed on the recommendation of the finance committee. The sum payable to the plaintiffs did not become due until after the lapse of such a time after the plaintiffs' accounts were lodged with the defendants as was necessary in order to enable the defendants to examine the accounts and to pay the sum due. At the earliest that date was not until the meeting of the council on February 16, 1910, and probably not until the meeting of the council on March 16. Therefore no sum was due to the plaintiffs on January 31, 1910, when the writ in the action was issued. The defendants have on March 19, 1910, since the issue of the writ and after examination of the accounts, paid to the plaintiffs 162*l.* 18*s.* 10*d.* in respect of the claim for the year ending September 30, 1909.

T. R. Colquhoun Dill in reply. With regard to the sum of 37*l.* 8*s.*, the plaintiffs acted properly in not incurring the expense of making repeated applications to the county court for payment of the sums expended on the pauper lunatic's maintenance. They acted reasonably in waiting until a considerable sum was due. The defendants are not ex œquo et bono entitled to recover the

sum claimed as money received to their use. Such a doctrine does not apply to a body like the guardians of a union, who are created by statute and are governed by statutory rules.

HAMILTON J. Sect. 24, sub-s. 2 (*f*), of the Local Government Act, 1888, imposes an obligation upon the county council to pay to the guardians of each poor law union within the county a certain sum in respect of each pauper lunatic, chargeable to the union, and maintained in an asylum, registered hospital, or licensed house. The sum so payable is to be calculated at the rate of 4*s.* a week during the period of maintenance, and it is a condition of the obligation to pay that the net charge upon the guardians, after deducting any sums received by them for the maintenance of the lunatic from any source other than local rates, shall be equal to or exceed 4*s.* a week throughout the period of maintenance. In working out the accounts convenience requires that a certain period of time should be taken. The section does not define the period beyond saying that it is "the period of maintenance." It is left to be determined according to the convenience of the public authorities concerned, and the authorities in this county have adopted annual periods terminating on September 30.

The claim in this action is to recover, under the above subsection, certain sums alleged to be due from the defendants to the plaintiffs for the cost of maintenance of pauper lunatics for the years ending September 30, 1908, and September 30, 1909. With respect to the claim for the year ending September 30, 1908, a dispute has arisen in reference to the maintenance of two pauper lunatics, Mary Ann Trembling and Sarah Hawkins. In Trembling's case, the claim is for 10*l.* 9*s.* 1*d.* The total cost of her maintenance for the year amounted to 24*l.* 15*s.* 7½*d.* During that year the plaintiffs received from a trustee of a fund in which the lunatic had a beneficial interest five sums amounting in all to 15*l.* 12*s.* 1*d.*, which, if deducted from the 24*l.* 15*s.* 7½*d.*, would leave a balance of 9*l.* 3*s.* 6½*d.*, or less than 4*s.* a week, as the net charge upon the plaintiffs for her maintenance. The dispute arises with regard to the first of those five payments, namely, a payment of a sum of 5*l.* 4*s.* 1*d.* This sum was paid to the plaintiffs during the year ending

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

Hamilton J.

September 30, 1908, under an order of the county court made upon a petition presented by the plaintiffs in respect of the cost of maintenance of the pauper lunatic during the preceding year. The plaintiffs therefore say that, though this sum was actually received during the year in question, still, inasmuch as it was claimed and received in respect of the cost of maintenance during the preceding year, it must be excluded from the deductions to be made in arriving at the net charge for the year ending September 30, 1908. That contention requires that I should read into the sub-section, after the words "after deducting any amount received by them for the maintenance of such lunatic," the words "in respect of his maintenance during the period in question." No such words occur in the sub-section. This sum of 5*l.* 4*s.* 1*d.* was received for the maintenance of the lunatic and it was received within the period in question. It has never yet been deducted, and it seems to me upon the language of the enactment that it falls to be deducted in the year when it was received.

The argument against this view is based upon the history of these grants in aid of local rates, upon the preamble to the section which refers to that history, upon the supposed intention of the Act that the ratepayers of each year shall bear the burdens of that year and not the burdens of the previous year, and upon the confusion which, it is said, will arise in the accounts. That contention comes to this, that the accounts of each period of maintenance are intended to be separate and complete in themselves, and that when the accounts for each year are made out and the balance paid, they are then to be deemed to be closed and settled, and no further claim is to be made in respect thereof, except perhaps for the purpose of rectifying some error in them. I cannot find anything in the Act which lends support to that contention. The fact that before the Act came into operation grants in aid were made, as recited in the preamble to the section, by annual votes in Parliament does not assist it. The Act has made the parliamentary grant permanent, but I fail to see how that shews any intention that the accounts of each year shall be deemed to be closed and settled for all purposes at the end of the year. It is not said

that, apart from the provisions of the Act, there has been any such settlement of account as would preclude the defendants from raising the present defence. It is true that circumstances may arise in which the ratepayers of one year may be called upon to bear burdens from which the ratepayers of a former year have escaped, but that is sometimes inevitable. Ratepayers can hardly be regarded as a body so discontinuous as to prevent local financial burdens being borne in one year, which, if events had happened differently, would have been borne in a former year. Nor do I think that there will be any confusion in the accounts by bringing this payment into the year in which it is paid. Upon this part of the claim, therefore, the defendants succeed, and as the net charge for the maintenance of Trembling is reduced to less than 4*s.* a week, the plaintiffs are not entitled to recover the 10*l.* 9*s.* 1*d.* claimed.

The question with regard to the rest of the claim for the year ending September 30, 1908, relates to the case of Sarah Hawkins. A sum of 37*l.* 8*s.* is in dispute, and the defendants seek to set off that sum or to counterclaim it against the plaintiffs' claim. The plaintiffs had maintained Hawkins as a pauper lunatic from 1902 until her death in May, 1907. She was entitled to a sum of money in the Post Office Savings Bank, and upon a petition presented by the plaintiffs to the county court after her death an order was made, dated September 20, 1907, for payment to them of the sum of 120*l.* 2*s.* 6*d.*, being the total cost of her maintenance while she was maintained by the plaintiffs. This sum was paid to the plaintiffs on October 8, 1907. It is not suggested that the plaintiffs acted improperly or from any desire to place the defendants at a disadvantage by waiting until a large sum had become due to them for maintenance before applying to the Court for payment, and it may well be that it was a convenient course to adopt, and one calculated to save expense. At the same time there was no reason why, as the charges for maintenance became due, the plaintiffs should not have applied to the county court for payment. I do not think that the plaintiffs can be in any better position by reason of their having received this sum after the close of the periods of maintenance than they would have been in if they had

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

Hamilton J.

exercised their right to require payment from time to time as the charges for maintenance accrued due. A sum which, if it had been collected by the plaintiffs, as it might have been, within each period of maintenance, would have had to be deducted before arriving at the net charge falling upon the plaintiffs, must, when collected by the plaintiffs after the expiration of the period of maintenance and after the defendants have paid to the plaintiffs the sum due for the maintenance of the pauper lunatic during that period, be deemed to be money received by the plaintiffs to the use of the defendants. It is money to which ex æquo et bono the defendants are entitled, and therefore can be recovered as money had and received to their use. In other words it is fair that money, which might have been collected at the time and if collected would have prevented the defendants from having to pay to the plaintiffs the contribution of 4*s.* a week under s. 24, sub-s. 2 (*f*), of the Act of 1888, should be applied in relief of the defendants' obligation, and should not be regarded as a windfall applicable to the relief of the ratepayers of another year. The defendants have therefore made out their counter-claim for this sum of 37*l.* 8*s.*

I come now to the claim in respect of the year ending September 30, 1909. The defendants first of all set up a defence to the whole of this claim, namely, that at the date when the writ was issued no sum was payable under the Act. The accounts for the year ending September 30, 1909, were lodged with the defendants on December 1, 1909, and the writ was issued on January 31, 1910. Sect. 24, sub-s. 2 (*f*), uses the word "pay," but that does not necessarily import an obligation to pay the moment the debt arises. It may be debitum in præsenti solvendum in futuro, and as the Act has not fixed any time at which payment must be made, it appears to me payment cannot be demanded until, in the first place, the guardians have placed before the county council the accounts necessary to enable them to ascertain what they have to pay; and, secondly, such time has elapsed as is necessary to enable the county council to make the payment lawfully. By s. 80 of the Local Government Act, 1888, the claim must first come before the finance committee; there must next be a meeting of the council

at which a resolution for payment is passed upon the recommendation of the finance committee; and an order for payment can then be made. The meetings of the council are fixed by statute or by a standing order of the council, and the next meeting of the county council after December 1, 1909, was held on February 16, 1910. It seems manifest that no obligation to pay could arise until after the meetings of the finance committee and the council, the assent of which was necessary to make the payment lawful. In these circumstances a writ issued on January 31, 1910, was premature. I further think that the defendants were entitled to a reasonable time in which to examine the accounts of the guardians, and the question what is a reasonable time must depend upon several factors, such as the time of year when the accounts are sent in, the complexity of the accounts, and the pressure of other business. Upon the evidence in the present case I am satisfied that a reasonable time had not elapsed before the second meeting of the council in March, 1910. What actually happened was that after making the necessary examination the defendants have paid almost the whole of the sum claimed, only 1*l.* 11*s.* 5*d.* remaining outstanding, which shews how necessary it is that a reasonable time for examination should be allowed.

There remains the dispute as to the sum of 1*l.* 11*s.* 5*d.*, which only arises if I am wrong in holding that the claim for the year ending September 30, 1909, was premature. This is in the case of the pauper lunatic Sarah Godwin Rawlings. It is on the same footing as that of Hawkins which I have already dealt with. The plaintiffs had maintained Rawlings for a period less than a year, namely, from August 7, 1908, to March 31, 1909. The defendants paid to the plaintiffs 1*l.* 11*s.* 5*d.*, being equal to 4*s.* a week for the period from August 7 to September 30, 1908. Rawlings's father was legally chargeable with the cost of her maintenance, and his liability arose from time to time as the cost of her maintenance accrued due, and not merely upon her discharge or death. In this case again it was probably the most convenient course for the plaintiffs to demand, as they did, payment from the lunatic's father in one lump sum on July 23, 1909, instead

1910

CALNE UNION v. WILTS COUNTY COUNCIL.

Hamilton J.

of demanding it from time to time as the charge for maintenance accrued due. For the reasons which I have given with regard to the sum of 37*l.* 8*s.*, the defendants are entitled to counterclaim for this sum as money had and received by the plaintiffs to their use.

The defendants therefore succeed upon all the items claimed, and judgment must be entered for them.

Judgment for defendants.

Solicitors for plaintiffs: *Cameron, Kemm & Co., for Bertram J. Spackman, Calne.*

Solicitors for defendants: *Merrimans & Thirlby, for R. W. Merriman, Trowbridge.*

W. F. B.

1911

Jan. 18, 19, 20.

BILLERICAY RURAL DISTRICT COUNCIL *v.* GUARDIANS OF THE POOR OF THE POPLAR POOR LAW UNION AND KEELING.

Highway—Extraordinary Traffic—Excessive Weight—Average Expense of repairing Highways in the Neighbourhood—Extraordinary Expenses—Damage recoverable—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act,* 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The amount which can be recovered under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, is the expense caused by the damage arising from the extraordinary traffic or excessive weight upon the highway, provided the damage has been such as to cause extraordinary expense, and in order that the expense may be extraordinary within the meaning of the section the highway rate of the district must be substantially increased by the damage so as to place an unfair burden on the ratepayers.

The expression "highways in the neighbourhood" in the section means similar roads in a neighbourhood of a similar character to that in which the road upon which the extraordinary traffic is conducted is situated.

ACTION tried before Channell J. without a jury.

The action was brought by the plaintiffs, the Billericay Rural District Council, to recover from the defendants the sum of

290*l.* 2*s.* 9*d.* for extraordinary expenses alleged to have been incurred by the plaintiffs in repairing a certain highway by reason of the damage caused by excessive weight passing along the same and by extraordinary traffic thereon alleged to have been conducted by or in consequence of the order of the defendants under the provisions of the Highways and Locomotives (Amendment) Act, 1878, and the Locomotives Act, 1898. (1) At the trial the judge found as a fact that there had been extraordinary traffic to some extent upon the highway and that the extraordinary traffic had damaged the highway in some places so that the expense of repairing it had been somewhat more than usual, but he also found that the highway rate in the district had not been thereby substantially increased so as to throw an unfair burden upon the ratepayers of the district.

C. A. Russell, K.C., and *A. A. Bethune*, for the defendants the Poplar Guardians. The defendants are entitled to judgment. There is no evidence of extraordinary expenses within the

(1) Highways and Locomotives (Amendment) Act, 1878, s. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

Locomotives Act, 1898, s. 12, sub-s. 1: "Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows:

"(*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court. . . . .

"(*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

1911

BILLERICAY RURAL COUNCIL v. POPLAR UNION AND KEELING.

meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, having been incurred. The section requires that the expenses should be substantially above the average expenses of repairing highways in the neighbourhood, not in the parish. The word " neighbourhood " was used intentionally by the Legislature. The object was to guard against the local authority spending little or nothing on a particular road in a parish with the object of keeping down the average expenditure on it and then seeking to recover the eventual cost of repairs as extraordinary expenses.

Macmorran, K.C., and *E. J. Naldrett*, for the plaintiffs. The evidence is that the highway has been damaged by reason of the extraordinary traffic so as to raise the expense of repairing it above the usual amount. The plaintiffs are therefore entitled to recover the amount of expense which the Court finds they have incurred by reason of the damage arising from that extraordinary traffic.

Sir F. Low, K.C., and *C. E. Jones*, for the defendant Keeling.

CHANNELL J. This case raises a question as to the construction of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, which is in several respects not very easy to construe. The section commences by imposing as a condition precedent to the right of the local authority to recover expenses incurred by reason of extraordinary traffic a certificate of the surveyor, and I think also the opinion of the authority itself, that extraordinary expenses have been incurred. Probably those conditions precedent were imposed for the protection of the ratepayers of the district from unnecessary and futile litigation on the part of the local authority which represents them, and also as some protection to the persons who are to be charged with expenses caused by damage arising from the extraordinary traffic. It was probably thought to be a protection to them that a surveyor who is a servant of a public authority, and as a rule a responsible person, should give his certificate, and that the authority itself should be satisfied. It is possible that the protection so afforded is not very great, but obviously the Legislature thought that it was a measure of protection, and I think they intended it to

protect both the person to be sued and also probably the ratepayers of the district. But a question of difficulty arises as to how far the words "the average expense of repairing highways in the neighbourhood" which are introduced in the part of the section which refers to the surveyor's certificate as to extraordinary expenses are to be used as a guide to the meaning of the later part of the section which deals with what the authority is to recover. Some of the words in the first part of the section are not repeated in the later part. The later part of the section provides that the local authority may recover "the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." The words are "such expenses as may be proved to the satisfaction of the Court," and therefore it is obvious that it is not the amount of damage certified by the surveyor which can be recovered. The concluding words "as aforesaid" incorporate the earlier portion of the section which deals with weight and traffic and apply the word "excessive" to the word "weight" and "extraordinary" to "traffic"; but the language is not such expenses "as aforesaid," but "such expenses as may be proved." It is therefore necessary to look at the meaning of the section as a whole, and in construing it I am much assisted by the authorities in which it has been pointed out that conducting extraordinary traffic along a highway is not a tort, and the damages to the local authority arising from it are not caused by a wrongful act. The payment provided for by the section is one for the use and exercise by a person of a right to an extent which is in excess of the usual and ordinary exercise of the right by his neighbours. The user must be something which increases the burden of the highway rate upon his neighbours somewhat unfairly by reason of the person using the highway having some extraordinary traffic or carrying some excessive weight, not unlawfully, but in excess of the rights which he, as one of the ratepayers, has. Indeed he may not even be a ratepayer in the district, he may be some outsider altogether, but the user must be something in excess of his rights as one of the public—I would rather say

1911

BILLERICAY RURAL COUNCIL v. POPLAR UNION AND KEELING.

Channell J.

as one of the public than as one of the ratepayers—so as to put an unfair burden upon the other ratepayers; and it seems to me that the word "extraordinary" which only occurs in connection with "expenses" in the part of the section which relates to the certificate must be read as if it was also in that part which deals with the expenses to be recovered, and that the damage which can be recovered must not only be damage caused by reason of the extraordinary traffic or the excessive weight, but it must be such as to cause extraordinary expense and thereby to put what I may call an unfair or unusual burden upon the ratepayers of the district; and that in ascertaining what is to be recovered the early part of the section which deals with extraordinary expenses and the average expense of repairing highways in the neighbourhood cannot be left out of consideration. In my judgment the sum to be recovered is the damage caused by the extraordinary traffic or the excessive weight, provided that it has been such as to cause extraordinary expense; and in considering whether the expense is extraordinary or not regard is to be had to the average expense of repairing highways in the neighbourhood. The expression "in the neighbourhood" is extremely vague, and it is not very easy to appreciate the reason for introducing those words, but I think perhaps it may have been that the Legislature did not desire to confine the area either to the parish or to the highway district. I think that the expression "repairing highways in the neighbourhood" practically means repairing similar roads in a neighbourhood of a similar character. For instance, in the case of a country road not very far off a town, a part of that road not very far off but nevertheless in the town would be excluded from being "in the neighbourhood." I therefore think that the expense which can be recovered is the extraordinary expense in the sense I have indicated. [His Lordship, having examined the evidence as to the traffic that had been conducted on the highway, continued:—] Upon these facts it seems to me that there is a case, but only a slight one, in favour of this traffic being considered extraordinary. There is also a case, but not a very strong one, that that traffic has in fact damaged the road. It has certainly damaged it in several places, but I do not think the

damage has been large. That is the conclusion at which I have arrived on the facts.

If that were all, I think I should have to find that the plaintiffs were entitled to recover something, but, as I have explained, according to my view of the section I do not think it is all, because I think that, in addition to the existence of damage, the damage must be such as to cause extraordinary expense, which I think means, in substance, that the highway rate of the district must be substantially increased by it so as to make it an unfair burden upon the other ratepayers. I think that is the only inference which can be drawn from the introductory words in s. 23 of the Highways and Locomotives (Amendment) Act, 1878, which refer to the average expense of repairing highways, and to extraordinary expenses having been incurred. A further matter to be considered is that it is not a tort to conduct extraordinary traffic upon a highway and the object of the section is to recoup the ratepayers for extraordinary expenses which have been thrown upon them by reason of a person having done a thing which is within his right but which is an unusual and somewhat excessive use of the road—excessive in the sense that it is in excess of what is fair as between him and the persons who are to pay for the repair of the road—and an excessive use of his rights. I have therefore to look at the figures that are put before me as to what has happened in previous years. [His Lordship then reviewed the evidence as to the expense of repairing the highway which had been incurred during the last seven years, and continued:—]

The general result is that although I think that this traffic has caused a certain amount of expense to the plaintiffs which they would not have had if the traffic had not gone over the road, yet I cannot say that it is extraordinary in the sense that the section means, or even that it has at all substantially increased the burden on the ratepayers of the district. In my judgment, therefore, the necessary conditions with regard to this special statutory right to recover this special statutory sum have not been made out by the plaintiffs, and as the burden of proof is upon them, and they have failed to satisfy

1911

BILLERICAY RURAL COUNCIL v. POPLAR UNION AND KEELING.

me that there has been such extraordinary traffic as to cause extraordinary expense, I must give judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Indermaur & Brown, for Lewis & Quennell, Brentwood.*

Solicitor for defendants the Poplar Guardians: *E. J. Marsh.*

Solicitor for defendant Keeling: *W. Hilliard.*

J. E. A.

1911

Jan. 27.

REA *v.* LONDON COUNTY COUNCIL.

London—Building—Notice to set back—Forecourt or other Space—London Building Act, 1898 (61 & 62 *Vict. c. cxxxvii.*), *s.* 3.

Sect. 3 of the London Building Act, 1898, does not empower the London County Council to give notice requiring the owner or occupier of land upon which he has erected a new building to set back an old boundary wall, forming the boundary of a space left between the new building and a street, so that the wall shall not be less than the prescribed distance from the centre of the roadway of the street.

CASE stated by a metropolitan police magistrate.

The appellant was summoned for neglecting to comply with the terms of a notice served on him by the respondents under s. 3 of the London Building Act, 1898 (1), requiring him to

1) By s. 13, sub-s. 1, of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), "No person shall erect any new building or new structure or any part thereof or extend any building or structure or any part thereof in such manner that any external wall of any such building or structure or (if there be a forecourt or other space between such external wall and the roadway) any part of the external fence or boundary of such forecourt or other space shall without the consent in writing of the council be in any direction at a distance less than the prescribed distance from the centre of the roadway of any street or way (being a highway)." This section is contained in Part II. of the Act.

By s. 3, sub-s. 1, of the London Building Act, 1898, "In every case where any new building or new structure or any part thereof is erected or any building or structure or any part thereof is extended in such manner that any external wall of such building or structure or (if there be a forecourt or other space between such external

cause the external fence or boundary of the forecourt or other space between the external walls of a certain new building and the roadway of a street called Logan Place in the borough of Kensington to be set back so that every part of the external fence or boundary of such forecourt or space should be at a distance from the centre of the roadway of such street not less than the distance permitted under Part II. of the London Building Act, 1894.

The facts of the case which were not in dispute were as follows:

(*a*) Logan Place is a street within the Royal borough of Kensington and is about 30 feet wide. It runs nearly east and west, and has been in existence as a road for some years. In the year 1909 it was paved by the borough at the expense of the frontagers and was then taken over by the borough. It is used for the purpose of carriage traffic and has become a highway.

(*b*) The appellant was underlessee for a term of years of a rectangular piece of land abutting on the south side of Logan Place. Neither the freeholder nor the lessee of this piece of land was before the Court, but the appellant was the owner within the definition of the London Building Act, 1894. The said piece of land measures 117 feet 6 inches from east to west, and rather over 95 feet from north to south.

(*c*) Up to the month of September, 1908, the said piece of land was in use as a garden with a lawn tennis court in the centre, the remainder of the ground round the tennis lawn being laid out in beds, borders, and paths. There were also (besides

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wall and the roadway) any part of any external fence or boundary of such forecourt or space shall be at a distance in any direction from the centre of the roadway of any street or way (being a highway) less than the distance permitted under Part II. of the principal Act . . . . the council may serve a notice upon the owner or occupier of the said building structure fence or boundary or upon the builder requiring him to cause such building structure fence or boundary or any part thereof to be set back so that every part of any external wall of such building or structure or of the external fence or boundary of such forecourt or space shall be at a distance in every direction from the centre of the roadway of such street or way not less than the distance permitted under Part II. of the principal Act."

1911

REA v. LONDON COUNTY COUNCIL.

the boundary walls) the following buildings on the said piece of land: (1.) potting shed, (2.) store, (3.) heating chamber, (4.) greenhouse, (5.) boiler-house. The store was let out to a builder, and the other four buildings were used by the nurseryman in whose occupation the garden was. The whole garden was enclosed (except where it abutted on some stables in Logan Mews belonging to Messrs. Farrow) by brick walls about 8 feet 6 inches high. The only entrance to the garden was by a doorway close to the north-west corner. All the said buildings were in existence for some years before 1894.

(*d*) In September, 1908, the appellant, who had obtained vacant possession of the said piece of land, began to erect a house, i.e., a residence, upon the south-western portion thereof, and at about this time a temporary opening about 10 feet wide was broken through the northern boundary wall at the east end of the greenhouse so as to enable carts with building materials to come through from Logan Place.

(*e*) The "prescribed distance" in the case of Logan Place is 20 feet, and the distance of the front of the wall and buildings forming the northern boundary of the said piece of land from the centre of the roadway of Logan Place is only 15 feet.

(*f*) On September 3, 1908, i.e., on or about the date of commencing to build the said residence, the appellant caused a proper building notice to be served on the district surveyor and submitted to him plans of the proposed building. A few days afterwards the respondents intimated to the appellant that he would be required to set back the said wall and other buildings on the north side of the said piece of land for a distance of 5 feet unless permission to retain them in their present position were obtained from the respondents. The appellant thereupon caused plans shewing the extent of the said wall and buildings to be prepared, and procured such plans to be certified by the district surveyor in pursuance or purported pursuance of s. 13, sub-s. 5, of the London Building Act, 1894. The certificate of the district surveyor was written on the plan, and was not given until October 28, 1908, when the building of the house was already in progress. The walls of the proposed new house were on October 5, 1908, about 2 feet above the ground level. By the

date of the certificate no alteration had been made in any of the certified buildings except the heating chamber, which had been substantially removed before October 5, though enough of it remained to enable the district surveyor to certify the plan, except that the temporary opening described in paragraph (*d*) had been made in the north wall.

(*g*) Of the total length of the northern boundary of the said piece of land 62 feet was occupied by the buildings numbered (1.), (3.), (4.), and (5.), and the remaining 55 feet 6 inches was occupied by wall only.

(*i*) As the residence approached completion the appellant bricked up again the opening which had been made in the north wall, leaving, however, a doorway 3 feet 3 inches wide and 7 feet high, into which a door has been fixed which serves as the front gate of the residence. Before so bricking up the opening and for the purpose of getting it properly bricked up the appellant pulled down some further portions of the wall at the side of the said opening, which portions had become in bad condition, so that the total length of wall pulled down and bricked up again was upwards of 16 feet. A similar doorway has also been made in the said north wall close to the eastern end thereof and a door fixed there for the back gate of the residence.

(*j*) The potting shed remains as it was, but the remaining portions of the heating chamber and the boiler-house built against the north wall were removed shortly before the residence was completed. The wood and glass upper part of the greenhouse, which had become more or less rotten, as well as part of the brickwork, was removed soon after the appellant occupied the residence, but the remaining brickwork and tile floor remain available for a new upper part in case the appellant should be found entitled to retain his greenhouse. Save as above in this and the preceding paragraph stated the north wall and the buildings on the north side of the said piece of ground remain exactly as they were before the appellant's building operations began.

(*k*) On or about December 16, 1909, the respondents served on the appellant, in pursuance of s. 3, sub-s. 1, of the London Building Act, 1898, a notice requiring the appellant to set back

1911

REA v. LONDON COUNTY COUNCIL.

his fence or boundary. The appellant refused to comply with the requirements of the notice.

The appellant contended :—

(1.) That the garden was not a forecourt or other space between the external wall of the new residence and the roadway within the meaning of Part II. of the London Building Act, 1894, and that the north wall and other buildings were not the external fence or boundary of such a forecourt or space, and that s. 13 of that Act and s. 3 of the Act of 1898 did not enable the respondents to require the setting back of existing buildings such as the potting shed, greenhouse, and wall.

(2.) That s. 13 had no application to a fence or boundary of a forecourt or space unless such fence or boundary was erected at the time when the new building was erected, and for this he relied on *London County Council* v. *Aylesbury Dairy Co.* (1)

(3.) Alternatively that the certificate of the district surveyor was a complete answer to the proceedings.

There seemed to me to be no substance in either of the appellant's first two contentions. His third contention appeared to me to fail on two grounds :—(*a*) Because the district surveyor's certificate was given after the residence had actually been in part erected, and (*b*) because in my opinion s. 13, sub-s. 5, did not apply to what was in effect a mere boundary wall. I therefore convicted the appellant.

Danckwerts, *K.C.*, and *Daldy*, for the appellant. The respondents had no power to require this wall to be set back. Sect. 13 of the London Building Act, 1894, and s. 3 of the London Building Act, 1898, only apply to a boundary wall which has been newly erected in connection with a new building. Here the wall was an old one. In *London County Council* v. *Aylesbury Dairy Co.* (1) there is an expression of opinion by Wright J. in favour of the appellant's contention. Dealing with precisely similar facts he said : "I may add, though we are not asked to decide the point in the present case, that it is doubtful whether s. 13 applies. It may be that no wall of a forecourt or

(1) [1898] 1 Q. B. 106.

space is within that section unless it is erected at the time when the building in question is erected or altered." Sect. 3 of the Act of 1898 does nothing more than provide the remedy for breaches of s. 13 of the Act of 1894, and if the case does not fall within s. 13, s. 3 of the later Act has no application.

Macmorran, K.C., and *Bodkin*, for the respondents. The object of s. 3 of the Act of 1898 was to require a man who erected a new building to see that the boundary wall of his forecourt (if any) should not be within the prohibited distance whether that boundary wall was old or new. There was here no forecourt before the building was erected, for there was no building to be forecourt to. Nor was the space in question an "other space" within the section, for by the terms of the section those words are confined to spaces lying between a building and a roadway. It was a garden and nothing more. Before the building was erected, therefore, there was no power to order the boundary wall to be set back. But upon the erection of the building that was converted into a "forecourt or other space" which was not such before, and thereupon it was brought within the section. It applies to the adoption of an existing garden wall as the boundary wall of a forecourt.

Danckwerts, K.C., in reply.

CHANNELL J. The point which presses upon me mainly is this: To justify any interference with an old building, whether it be a house or a garden wall, you must find reasonably clear words to shew that the Legislature intended to take away the owner's right to have that building continue as it had been before. I cannot find any words sufficient for that purpose in either of the two sections with which we have to deal. The first section is s. 13 of the London Building Act, 1894: "No person shall erect any new building or new structure or any part thereof or extend any building or structure or any part thereof in such manner that any external wall of any such building or structure or (if there be a forecourt or other space between such external wall and the roadway) any part of the external fence or boundary of such forecourt or other space shall without the consent in writing of the council be in any direction at a distance

1911

REA v. LONDON COUNTY COUNCIL.

Channell J.

less than the prescribed distance from the centre of the roadway." It seems to me that only applies to a case where some new external wall of a house or other building or new external fence of a forecourt has been erected within the prescribed distance. That seems to me the natural meaning of the words, and it is that which apparently Wright J. thought they bore. That section contains the prohibitive part of the legislation, the statement of what is not to be done. Then the section which originally provided the remedy for the contravention of s. 13 was s. 14, the construction of which was dealt with in the case of *London County Council* v. *Aylesbury Dairy Co.* (1) That section was shortly after that decision repealed, and s. 3 of the London Building Act, 1898, was substituted for it. It may possibly be that, as Mr. Macmorran tells us was the fact, the intention was to some extent to do away with the effect of that decision, but the Court has to construe the words which are in point of fact used. We have not to consider what the intention was except so far as it appears from the actual words of the new section. That section says "In every case where any new building or new structure or any part thereof is erected or any building or structure or any part thereof is extended in such manner that any external wall of such building or structure or (if there be a forecourt or other space between such external wall and the roadway) any part of any external fence or boundary of such forecourt or space shall be at a distance in any direction from the centre of the roadway" less than the distance prescribed, the council may serve a notice requiring the owner to set back the external wall of the building or the fence of the forecourt as the case may be. Now Mr. Macmorran says that if you have, as here, an old boundary wall separating a garden from the roadway, and you erect in that garden a new building well beyond the distance within which building is prohibited, you thereby make the part of the garden between the building and the road "a forecourt or other space," and you must consequently pull down the old boundary wall if it is within the prohibited distance from the centre of the roadway. I do not think that that is the meaning of the words. I think

(1) [1898] 1 Q. B. 106.

that in this section, as in s. 13, the intention was to deal with new structures only, whether those structures were the external walls of a building or the external fence of a forecourt, and that it was not intended to compel a man to pull down a wall which has been there for many years merely because he has converted the ground behind it into a space more or less analogous to a forecourt. There is not sufficient in the language to indicate any intention to take away a person's existing rights. It is said that it does not make much difference whether the man is building a new wall or using an old one. But it seems to me to make all the difference. In this particular case the matter is complicated by the fact that the external boundary of the garden did not consist throughout of an ordinary wall, but consisted partly of small buildings which it was sought to interfere with. But even if that complication had not been there, and if this had been a simple garden wall, the consequence would have been just the same. The fact that a man builds a house on an existing garden clear of the prohibited distance does not oblige him to alter the area of the garden. On that point, therefore, I think the decision of the magistrate was wrong; and under those circumstances it becomes unnecessary to discuss the question of the certificate.

BRAY and HAMILTON JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Ashurst, Morris & Co.*
Solicitor for respondents: *E. Tanner.*

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C. A.
1911
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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR, APPELLANTS *v.* GUARDIANS OF HACKNEY UNION, RESPONDENTS.

Poor Law—Settlement by Residence—Irremovability—Residence of Child under Sixteen with deserted Mother—Acquisition of Settlement under Sixteen—Settlement and Removal—Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *ss.* 1, 3—*Poor Removal Act*, 1848 (11 *&* 12 *Vict. c.* 111), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

A legitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence in a parish with its deserted mother who is irremovable therefrom:—

So *held* by the Court of Appeal, affirming the decision below (per Lord Alverstone C.J. and Pickford J., Darling J. dissenting), and following the opinions expressed in *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450, and *Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255.

CASE stated for the opinion of the Court pursuant to s. 11 of 12 & 13 Vict. c. 45.

On November 12, 1909, the respondents obtained an order from two justices for the county of London whereby it was adjudged that the parish of Holy Trinity and St. Mary, Kingston-upon-Hull, was the place of the last legal settlement of one Mabel Pelham (aged about twenty-three years) and her illegitimate child (aged about two years), paupers then chargeable to the Hackney Union at the union workhouse, and whereby the appellants were ordered to receive and provide for the said paupers according to law.

The appellants gave due notice of appeal to quarter sessions against the said order, and such appeal having been duly entered the following special case was afterwards, by consent of parties and by order of Scrutton J., stated between the appellants and the respondents:—

1. The said Mabel Pelham is the lawful daughter of John Pelham and Maria Pelham, and was born in the parish of Newhaven, Sussex, on April 13, 1886.

2. John Pelham resided with Maria Pelham until 1888.

3. In 1888 John Pelham deserted Maria Pelham, his wife, with whom he had been living at Newhaven, and went to reside at Weymouth, where he remained until June, 1894.

4. From the date of such desertion Maria Pelham continued to reside without interruption or relief in the parish of Newhaven with the pauper Mabel Pelham for upwards of one year thenceforward until 1900, and by reason of the first year of such residence Maria Pelham was rendered exempt from removal from the Newhaven Union in accordance with the provisions of s. 3 of the Poor Removal Act, 1861, as amended by s. 17 of the Poor Law Amendment Act, 1866.

5. At the time of John Pelham's said desertion, the pauper Mabel Pelham was residing with her mother, Maria Pelham; and Mabel Pelham continued there to reside without interruption or relief for the term of three years and upwards with Maria Pelham until 1900.

6. In 1900 the pauper Mabel Pelham, who was then about fourteen years of age, left Newhaven, and went to reside elsewhere at various places, but she has not since 1900 resided in any parish for a sufficient length of time to acquire a settlement.

7. About the end of 1894 John Pelham went to reside within the area of the Kingston-upon-Hull Incorporation for the Poor, and he has continued to reside within such area ever since.

8. At the time the pauper Mabel Pelham attained the age of sixteen years—viz., on April 13, 1902—John Pelham was last legally settled in the parish of Holy Trinity and St. Mary, Kingston-upon-Hull, having resided for the term of three years in that parish in accordance with the provisions of s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

9. On November 12, 1909, the said order of justices was obtained by the respondents adjudging the pauper Mabel Pelham and her illegitimate child to be settled in the parish of Holy Trinity and St. Mary, Kingston-upon-Hull.

10. The appellants affirm that the pauper Mabel Pelham resided in the parish of Newhaven for the term of three years in such manner and under such circumstances in each of such years as to have rendered her irremovable in accordance with

C. A. 1911

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

the provisions of s. 3 of the Poor Removal Act, 1846, and that she acquired a settlement in the parish of Newhaven by such residence under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

11. The appellants further affirm that such alleged settlement in the parish of Newhaven is the last legal settlement of the pauper Mabel Pelham and that the order of justices of November 12, 1909, is bad and ought to be quashed.

12. The respondents affirm that the pauper Mabel Pelham took the settlement of her father, John Pelham, until she reached the age of sixteen, to wit, April 13, 1902, and that on that date she was settled in the parish of Holy Trinity and St. Mary, Kingston-upon-Hull. The respondents further affirm that the pauper Mabel Pelham, when she reached the age of sixteen, retained her settlement in the last-named parish, and that that parish has been the place of her last legal settlement ever since.

The question for the opinion of the Court was whether upon the facts above stated the pauper Mabel Pelham and her illegitimate child were settled in the parish of Holy Trinity and St. Mary, Kingston-upon-Hull, or not. If the Court should be of opinion that they were so settled the order of justices was to be confirmed, but otherwise it was to be quashed.

Herbert Davey, for the appellants. The order of the justices ordering the removal of the paupers was wrong, as Mabel Pelham had acquired a settlement in Newhaven in her own right by virtue of the provisions of s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. (1) She had resided there for three years, had become irremovable, and therefore

(1) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise: provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

by s. 34 had acquired a settlement there. As was pointed out by Lord Watson in *Reigate Union* v. *Croydon Union* (1), s. 34 creates a new species of settlement by residence. In *West Ham Union* v. *Holbeach Union* (2) and *Fulham Parish* v. *Woolwich Union* (3) it was clearly recognized that a child under sixteen, whether legitimate or illegitimate, can acquire a settlement by residence.

[LORD ALVERSTONE C.J. By s. 35 of the same Act (4) it would look as if the pauper Mabel Pelham took her father's settlement up to the age of sixteen.]

That section does not affect the provision of s. 34; it was intended to do that which the side-note says, namely, to abolish derivative settlements. A child under sixteen could under the old law acquire a settlement for itself: *Rex* v. *Bleasby Inhabitants* (5); *Rex* v. *Wilmington Inhabitants.* (6) Further, John Pelham having deserted his wife and family, the wife was in the same position as if she was a widow and became by residence for one year in Newhaven irremovable from there: see s. 3 of the Poor Removal Act, 1861, as amended by s. 17 of the Poor Law Amendment Act, 1866. As the pauper Mabel Pelham resided with her mother at Newhaven, she became irremovable also: see s. 3 of the Poor Removal Act, 1846; and thus Mabel Pelham was enabled to gain a settlement in her

(1) (1889) 14 App. Cas. 465, at p. 481.

(2) [1905] A. C. 450.

(3) [1907] A. C. 255.

(4) Divided Parishes and Poor Law Amendment Act, 1876, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(5) (1820) 3 B. & A. 377.

(6) (1822) 5 B. & A. 525.

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

own right under s. 34 of the Act of 1876. [He also referred to *Reg.* v. *St. Mary, Islington.* (1)]

Sydney Davey, for the respondents. It is conceded that Maria Pelham being a deserted wife became irremovable from Newhaven, and that all the time the pauper Mabel Pelham was living with her she was irremovable also. But it is not admitted that the pauper acquired a settlement at Newhaven. The statutory provisions relating to irremovability are quite distinct from those relating to settlement; and a person may be irremovable although he may not be acquiring a settlement. The pauper Mabel Pelham left Newhaven before she was sixteen, and she could not acquire a settlement for herself before attaining that age. By the express words of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, she, being a legitimate child, could not gain a settlement under sixteen apart from her father; and that has been recognized in a series of cases: see *St. Pancras Guardians* v. *Norwich Guardians* (2); *Dorchester Union* v. *Poplar Union* (3); see also *Mitford and Launditch Union* v. *Wayland Union.* (4) As to the two recent cases in the House of Lords, *West Ham Union* v. *Holbeach Union* (5) and *Fulham Parish* v. *Woolwich Union* (6), each had reference to an illegitimate child, and there is a clear distinction running through all the statutes between legitimate and illegitimate children. This distinction has, however, not always been kept in view. Some difficulty has been created by the observation of Lord Watson in *Reigate Union* v. *Croydon Union* (7), where he said that one effect of s. 35 of the Act of 1876 was "to fix absolutely the age of sixteen as the period of emancipation, in all questions regarding the settlement of legitimate children as had already been done in the case of illegitimates." There has been no statutory provision fixing sixteen as the period of emancipation in the case of illegitimate children. In *West Ham Union* v. *Holbeach Union* (5) there is nothing to shew that a legitimate child under sixteen can acquire

(1) (1870) L. R. 5 Q. B. 445.
(2) (1887) 18 Q. B. D. 521.
(3) (1888) 21 Q. B. D. 88.
(4) (1890) 25 Q. B. D. 164.
(5) [1905] A. C. 450.
(6) [1907] A. C. 255.
(7) 14 App. Cas. 465, at p. 484.

a settlement for itself, and it is to be noted that Lord Macnaghten put his judgment on s. 35 rather than on s. 34; and as regards *Fulham Parish* v. *Woolwich Union* (1) the statement of the Lord Chancellor (2) that "s. 34 of the Act of 1876 was intended to say, and did say, that all persons, of whatever age and whether legitimate or not, who had a status of irremovability should be also endowed with a settlement," is in conflict with the statutes and the earlier cases as to legitimate children, and, further, the observation was not necessary for the decision. The old cases of *Rex* v. *Bleasby Inhabitants* (3) and *Rex* v. *Wilmington Inhabitants* (4) deal only with the question of emancipation. If the argument for the appellants is right, it follows that the members of a family, including young children, might conceivably have all different settlements, and the family might be broken up. Under s. 35 of the Act of 1876 the pauper Mabel Pelham was at the age of sixteen settled at Kingston-upon-Hull, where her father had acquired a settlement. [He also referred to *Rutherglen Parish Council* v. *Glasgow Parish Council*. (5)]

Herbert Davey, in reply, cited *Llanelly Union* v. *Neath Union*. (6)

Lord Alverstone C.J. In this case we have been very greatly assisted by the arguments of counsel, and I am very grateful to them both for the assistance they have given me.

But for two cases in the House of Lords, to which I shall have to refer later, I should have no difficulty in deciding that the respondents are right and that this appeal ought to be dismissed. I shall have to consider how far those two judgments are so binding upon me that, whatever my own opinion may be, I shall be able or not to give a judgment in favour of the respondents.

The facts of the case are not in controversy. For the purposes of this case we may disregard Mabel Pelham's child. Mabel Pelham, the pauper who is in question here, was the legitimate daughter of John Pelham and Maria Pelham, and she was born

(1) [1907] A. C. 255.
(2) Ibid. at pp. 259, 260.
(3) 3 B. & A. 377.
(4) 5 B. & A. 525.
(5) [1902] A. C. 360.
(6) [1893] 2 Q. B. 38.

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Lord Alverstone C.J.

at Newhaven in 1886. Till 1888 John Pelham resided with his wife at Newhaven; but in 1888 he deserted her and went to Weymouth. From 1888 down to the year 1900 the mother and Mabel Pelham resided together at Newhaven. In 1894 John Pelham went to reside at Kingston-upon-Hull, and has acquired a settlement there. In 1900, at the age of fourteen, Mabel Pelham left Newhaven, and has resided since then at different places, in none of which has she acquired a separate settlement. In these circumstances an ex parte order has been made by the justices, on the application of the Hackney Union, where Mabel Pelham was found with her illegitimate child, that she should be removed to Kingston-upon-Hull. That order states that Mabel Pelham with her child are now inhabiting the parish of St. John's at Hackney; that Mabel Pelham has not acquired a status of irremovability in the Hackney Union; that John Pelham resided for a period of three years or more in the parish of Kingston-upon-Hull Poor Law Incorporation; and that Mabel Pelham has not acquired a settlement in her own right since attaining the age of sixteen years. The justices have taken the view contended for by Mr. Sydney Davey, that, under those circumstances, the settlement of Mabel Pelham was the settlement of her father, and that she had not acquired a status of irremovability so as to prevent them from ordering her to go from Hackney to Hull.

It is contended by Mr. Herbert Davey that the justices' order is wrong, that Mabel Pelham had become irremovable from Newhaven, that having become irremovable from Newhaven, and having resided there for the term of three years, she had acquired a settlement there, and that therefore the justices ought to have decided against the view that she could be removed to Hull because they were not justified in making her settlement the settlement of her father. It is said that a settlement was acquired by Mabel Pelham upon the ground that she had been living with her mother, who was a deserted woman and who was irremovable, at Newhaven. One of the matters that creates a difficulty in this case is that if Mabel Pelham had remained at Newhaven, and was still living there after the age of sixteen, she could not have been removed. Mr. Sydney

Davey concedes that in such circumstances, whatever her settlement was, she could not be removed from Newhaven. That point, however, does not assist in the elucidation of this case, because, as I have already pointed out, Mabel Pelham came away from Newhaven when she was fourteen years old, and has not acquired any settlement there since the age of fourteen, if she had not acquired one at that time.

Upon the language of the statutes, although it is impossible to say they are free from difficulty, I should not have had much difficulty in arriving at a conclusion in favour of the view presented by Mr. Sydney Davey. It is necessary to keep clear in one's mind the distinction between settlement and irremovability. I quite agree that for the purposes of s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, if you get irremovability you may solve the question of settlement, but in dealing with settlement, properly so called, it must be remembered that irremovability was for a long time quite a different question from that of settlement, and for many purposes it is so now. Dealing with the statutes, although I must read one or two sections which affect both irremovability and settlement, I think it will be convenient to take them in the order in which they were passed, and make the observations upon them as I pass through them.

The Poor Law Amendment Act, 1834, by s. 71, deals with the question of an illegitimate child. It enacts: "Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." That is a clear statutory statement, that a bastard may acquire a settlement in its own right before the age of sixteen, because the alternative is put, "until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." Therefore the distinction which Mr. Sydney Davey has drawn between legitimate and illegitimate children is to be found in the statutes themselves, and lies to a great extent at the root of the argument that we have to consider.

The next statute of importance is the Poor Removal Act, 1846, s. 1 of which provides that "from and after the passing of this

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Lord Alverstone C.J.

Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant." That period of five years was reduced to three years by s. 1 of the Poor Removal Act, 1861, and is now reduced to one year by s. 8 of the Union Chargeability Act of 1865. The Act of 1846 is a statute with regard to removability, and it is provided that five years' residence, now one year's residence, should prevent a person being removed. Sect. 3 of the same Act says: "No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child, from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish." I point out that that section is a removal section and has nothing to do with the question of settlement properly so called.

The next material statute is the Poor Removal Act, 1861, and that says, dealing again with the question of removal, in s. 3, "Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years"—now one year under s. 17 of the Poor Law Amendment Act, 1866—"in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident. . . . ." It occurred to me during the argument that that might be a short cut to help the appellants' contention, because Maria Pelham had been deserted as far back as the year 1888, she had been living all the time with her children at Newhaven, and it might have been said that the child, as the woman was in the position of a widow, would have got her settlement. It is quite plain, however, that this is again a removal section, and was intended to protect a deserted woman from being removed, in the same way as she would be protected if she were a widow.

Finally we come to the Divided Parishes and Poor Law Amendment Act, 1876, which has given rise to all the difficulty.

Sect. 34 enacts that "where any person shall have resided for the term of three years"—that is still three years—"in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein." If that is taken as an enactment by itself, it may be said to cut the knot in a very simple way, and to provide that whenever a person has become irremovable he shall have a settlement in the place from which he is irremovable. If that is a perfectly general section, it applies to cases of legitimate children who are residing with their mother under circumstances where clearly they would be irremovable because they were residing with her, but I think, remembering that it is for the purpose of giving a specified settlement in the parish, clearer words would be wanted to indicate that that was the intention of the Legislature. I call attention to the words "shall be deemed to be settled." I have a strong feeling that it was intended that that section should apply to make a person irremovable, and therefore deemed to have a settlement in the parish which it was sought to remove him from. It is a materially different step to say not only is it to apply to Hackney, where this pauper was, but it is to apply to give her a hypothetical settlement in New-haven, from which she was not sought to be removed. The object, I think, of s. 34 was for the purpose of preventing a person being removed from the place where she had acquired, or had been there long enough, so to speak, to give her what was deemed to be, a settlement under this section. The difficulty is increased by s. 35. I do not think we can give effect to either argument without introducing some limiting words either in s. 34 or s. 35. Sect. 35 is undoubtedly a settlement section: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." That section by itself seems to me to be a plain enactment that there are to be no derivative

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Lord Alverstone C.J.

settlements, except in the two cases mentioned, and in the case of the child it is to be the settlement of the father or its widowed mother, as the case may be, up to that age (that means up to sixteen), and that it shall retain the settlement so taken until it shall acquire another. I am wholly unable to reconcile those words with the suggestion that a legitimate child has been acquiring a settlement by residence instead of acquiring a settlement from the father. I think the statute says in the plainest possible terms that the child is to have the settlement of his father up to sixteen and to retain it—that means retain that settlement that it has derived from its father. Then the section continues: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." Bearing in mind that that had previously been enacted so far back as 1834, I think the framers of this section certainly had in mind the two cases of legitimate children and illegitimate children, and dealt with them in the way which, according to the existing law, would have been expected—that is to say, the legitimate child gets the settlement of the father or the widowed mother, as the case may be, up to sixteen, and the illegitimate child keeps the mother's settlement only until such time as it acquires another; that has nothing to do with sixteen, because it is contemplated that it might be before. Then the last clause of s. 35 is: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." That does not throw any direct light upon the question.

Mr. Herbert Davey says that by s. 34 a settlement has been acquired by Mabel Pelham at Newhaven. I feel a great difficulty in taking that view, even apart from the distinction between the sections, but it seems to me rather difficult to say that it was acquired at the age of fourteen. I do not think that the fact of the pauper leaving her mother at fourteen can be disregarded altogether — it is a necessary

incident in this particular case—and I should come to the same conclusion if Mabel had remained with her mother up to the age of sixteen. If s. 34 was intended to have that very wide scope and effect, it is a little difficult to see why s. 35, at any rate as it is now framed, should be there. Sect. 34 appears to provide for a hypothetical settlement in certain cases of irremovability where an attempt is made to remove a pauper; while s. 35 is a settlement section. The case is not upon this view devoid of authority, and I refer to those authorities because I have no doubt that this case will go further. I begin with the case of *St. Pancras Guardians* v. *Norwich Guardians*. (1) Dealing with the contention that whereas the pauper on the last day of the sixteenth year would have the settlement of the father, on the first day of the seventeenth year it would be the place of the child's birth, Mathew J. said this: "I cannot see any reason for that legislation. It appears to me, looking at the language of the latter part of the section, that this cannot be what was meant, because in the case put, where the settlement is inquired into before the age of sixteen is arrived at, that settlement is to be retained subsequently." *Dorchester Union* v. *Poplar Union* (2) and *Mitford and Launditch Union* v. *Wayland Union* (3) are to the same effect; but in the course of that series of cases there comes *Reigate Union* v. *Croydon Union* (4), in which occurs the passage in the judgment of Lord Watson on which comment has been made. He says (5): "The effect of s. 35 is . . . . to fix absolutely the age of sixteen as the period of emancipation, in all questions regarding the settlement of legitimate children as had already been done in the case of illegitimates." Those last five words are said by Mr. Sydney Davey to be inaccurate. Mr. Herbert Davey has not been able to call our attention to anything which had settled the matter in the case of illegitimates, except the section in the Act of 1834 to which I have referred, which most unquestionably did not fix sixteen in the case of illegitimates, and I know of no statute subsequent to that which did it. I

(1) 18 Q. B. D. 521.
(2) 21 Q. B. D. 88.
(3) 25 Q. B. D. 164.
(4) 14 App. Cas. 465.
(5) Ibid. at p. 484.

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Lord Alverstone C.J.

think a good deal of the misunderstanding that has arisen in these cases is to be traced to the unfortunate circumstance that Lord Watson, in stating his opinion on s. 35, read the words as referring to legitimates. If he had had in his mind that it was the second paragraph of s. 35 which deals with illegitimates, I do not think he would have so framed it. Be that as it may, all the learned judges took the view at the time of that decision that it did fix sixteen as the age up to which the child was to have its parents' settlement. Lord Macnaghten says (1): "Every child up to the age of sixteen takes the settlement of the father, but if the father dies while the child is under sixteen and the mother being a widow acquires a settlement in her own right before the child attains that age, or, I suppose, if the deceased father had no settlement, the child takes the settlement of its widowed mother up to the age of sixteen. In either case, whether it takes the settlement of the father or of the mother, it retains the settlement so taken until it acquires another." That is a distinct statement of the meaning of that section in accordance with the argument placed before us by Mr. Sydney Davey.

The next case that came before the House of Lords which I ought to notice in order of time is *West Ham Union* v. *Holbeach Union*. (2) It is quite true that the point the House of Lords were there considering was the status of an illegitimate child which had resided with her mother in a parish for three years in such manner and under such circumstances as would in accordance with the statutes in that behalf render her irremovable. After she reached sixteen the question of her settlement arose, and it was held that by her residence she had acquired a settlement in that parish. Lord Halsbury in delivering the judgment of the House of Lords, as Lord Chancellor, in a very brief judgment used words which seem to be contrary to the view that I am now expressing. He said: "My Lords, in this case, if it were res integra, I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed, I am not sure that I would not go further than he does and strive to bring back the meaning

(1) 14 App. Cas. at p. 489. (2) [1905] A. C. 450.

of the word 'settlement' to the meaning it had when Bott and Lord Kenyon were its expositors; but the statute which has turned a 'status of irremovability' into a settlement has rendered such an effort impossible." Apart from the view which I have suggested, that s. 34 was intended for the purpose of dealing with the case where you were trying to remove people from a particular place and was wanted for the purpose of giving a hypothetical settlement in that particular case, that opinion of Lord Halsbury's seems to be an opinion upon the meaning of s. 34 which is binding upon me, because he says the statute has turned a status of irremovability into a settlement. If that be the true view, then it may be said that irremovability is now for the purpose of settlement all that need be proved; whenever persons are irremovable they are deemed to be settled there. I desire to point out in passing that it is difficult to apply that to the case of a child who has gone away at fourteen, or at any age under sixteen. It seems to me that the view expressed by Lord Halsbury is a distinct opinion which is not in accordance with the view I am most respectfully expressing. The authorities to which our attention has been called do not appear to have been called to the attention of the House, but at the same time this is the opinion of a very great judge upon a cognate point, and I cannot treat it as an obiter dictum. It has been pointed out to us that Lord Macnaghten did not base his judgment on the same ground as Lord Halsbury, but it is to be observed that he did not differ; he desired to rest the case on s. 35 rather than on s. 34. Then comes the part of his judgment which, so far as s. 35 is concerned, is the strongest corroboration of the view I have been expressing. He says: "By the first clause of s. 35 all derivative settlements are abolished with two exceptions—one in the case of a wife, which has no application to the present question; the other in the case of a legitimate child under the age of sixteen. In the latter case the child on attaining the age of sixteen retains the settlement which it had taken up to that age. But it can no longer be a derivative settlement, for the enactment expressly abolishes derivative settlements with the two exceptions I have referred to. A corresponding result must, as it seems to me, follow in the case of an illegitimate child, though the provision is

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Lord Alverstone C.J.

rather obscure owing to its brevity. 'The practical effect of the second clause of s. 35 is,' says Lord Watson, 'to place illegitimate, as nearly as may be, on the same footing with legitimate children.'" If Lord Macnaghten was referring to the passage of Lord Watson's judgment in *Reigate Union* v. *Croydon Union* (1), as I think he was, the passage to which he referred is not altogether accurate, and I cannot help thinking that everybody was assuming at that time that the whole of Lord Watson's judgment was accurate.

I am then met by the further difficulty of the judgment of Lord Loreburn in *Fulham Parish* v. *Woolwich Union*. (2) That case also had reference to an illegitimate child, and the point at issue was whether or not an illegitimate child could acquire a settlement by residence before the age of sixteen. If the distinction between legitimate and illegitimate children is kept in view, there would not seem to be much reason why he should not be able to do so. As I have pointed out, since 1834 legitimate and illegitimate children have not been in the same position, and the Divided Parishes and Poor Law Amendment Act, 1876, stereotyped the distinction. It is further to be noticed that, although some of the cases like *West Ham Union* v. *Holbeach Union* (3) were called to the attention of the House, none of the cases which have established the distinction in the case of legitimate children seem to have been brought before the House. Whether that arose from some misunderstanding I do not know, but it certainly is unfortunate that the authorities we have had to consider were not presented to the House at all. In delivering judgment in *Fulham Parish* v. *Woolwich Union* (4) Lord Loreburn expressed this opinion, which is equally strong against the view that I am expressing. He said: "Now it is to my mind clear that up to the time when the Act of 1876 (39 & 40 Vict. c. 61) was passed such children could acquire a settlement in certain circumstances"—that is, illegitimate children. "It is also clear that under the Act of 1846 (9 & 10 Vict. c. 66), if they resided in any union for a sufficient time, they could acquire a status of irremovability as

(1) 14 App. Cas. 465.
(2) [1907] A. C. 255.
(3) [1905] A. C. 450.
(4) [1907] A. C. at p. 259.

distinguished from a settlement. And to my mind s. 34 of the Act of 1876 was intended to say, and did say, that all persons, of whatever age, and whether legitimate or not, who had a status of irremovability should be also endowed with a settlement. This is not really questioned, except as to illegitimate children. But it is argued that the effect of s. 35 of the same Act was to qualify s. 34 and to make it inapplicable in the case of illegitimate children under sixteen. I cannot think so. The two sections deal with different subjects and are entirely consistent the one with the other." Lord Macnaghten uses language which shews that he was not differing from the Lord Chancellor. Lord James, at the end of his judgment, says: "I concur in the opinions expressed in the Court of Appeal, that 'person' in the Acts of 1846 and 1876 refers alike to unemancipated and emancipated persons." There are thus three or four opinions of the House of Lords inconsistent with the view that I am expressing, and but for these views and opinions of the House of Lords I should have felt myself bound by the authorities to which Mr. Sydney Davey has called our attention. Bound as I am loyally to follow that which is involved in a judgment of the House of Lords, I am precluded by these decisions of the House of Lords from taking the view that I should otherwise have taken, that there is the distinction to be drawn between legitimate and illegitimate children for the purpose of s. 34. I come to the conclusion that, while my opinion is in favour of the view contended for by Mr. Sydney Davey, I must decide in favour of the appellants, being bound by the decisions in the House of Lords to which I have just referred.

Darling J. I have followed the arguments addressed to us on both sides as well as, from the complication of them, I have been able. Particularly have I been struck by the tracing of them to their necessary consequence, and the observing of the result which would follow provided the argument for the appellants or the argument for the respondents were to prevail. I know that there have been lawyers in the past so learned that they would decide any point regardless of the practical consequences of their judgments. There have been judicial cynics who held that the

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Darling J.

argumentum ab inconvenienti was always and necessarily bad. I do not pretend to be the equal of any of those. I think I can perceive through the wilderness of single instances in which for a whole day we have been wandering that Parliament intended that up to sixteen years of age the settlement of a child should be and follow that of its lawful father or widowed mother, although it might perhaps be irremovable from somewhere else into the area of such settlement. In my opinion the settlement of Mabel Pelham is, and has all along been, that of her father. Certain observations to which my Lord has just called attention in the House of Lords, pointing to a contrary conclusion, do not appear to me necessarily to decide this case in regard to settlement as distinct from irremovability. As regards settlement, they do not appear to me to decide it in favour of the appellants. I think that s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, which enacts that the child shall retain the settlement which, in my opinion, this child had, namely, that of her father, should prevail, and, therefore, notwithstanding the observations in the House of Lords which have just been read, and which I therefore will not repeat, I think that the judgment should be in favour of the respondents.

PICKFORD J. The pauper Mabel Pelham up to the age of fourteen lived with her mother, Maria Pelham, in the parish of Newhaven, in the Newhaven Union, and Maria Pelham had been living apart from her husband, who deserted her, since the year 1888. At the age of fourteen Mabel Pelham ceased to reside with her mother and lived in several places other than Newhaven, but had not acquired a settlement anywhere else. It is admitted by Mr. Sydney Davey, who argued the case for the respondents, that both Maria Pelham and Mabel Pelham acquired a status of irremovability at Newhaven at the time that the girl was fourteen, and it is upon that position that I consider this case. That being so, s. 34 of the Act of 1876 provides: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall

be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." That in terms would apply to Mabel Pelham, because she had resided for more than three years and had become irremovable in Newhaven, and she had not acquired a settlement anywhere else. But Mabel Pelham was the legitimate child of John Pelham, and according to s. 35 of the same Act of 1876, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." That section, if read in its terms, also applies to Mabel Pelham; so that Mabel Pelham, being a legitimate child, up to the age of sixteen took the settlement of her father. It is clear that both sections cannot operate, because she cannot, I take it, have two settlements, and therefore one section or the other must be qualified. Looking at s. 35, the first part of which I have read, in comparison with the second paragraph, which I have not read, and which says "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," it seems to me that the section draws a clear distinction between a legitimate and an illegitimate child. The legitimate child is up to the age of sixteen years to take the settlement of its father, and after that age it is to retain that settlement until it acquires another; with regard to an illegitimate child, the section provides that it shall retain the settlement of its mother until it acquires another settlement. Therefore the section contemplates that in the case of an illegitimate child another settlement may be acquired even before the age of sixteen, and it has been clearly decided by several authorities that that is so. That being so, I should have thought that s. 35 must be read with s. 34, or rather s. 34 must be read in such a way as to except from the general provision of s. 34 a legitimate child whose case is provided for by the first branch of s. 35, and that such a child, not being able to acquire any settlement of its own before the age of sixteen, did not come within the

1910

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Pickford J.

provisions of s. 34. I think there are authorities (which I need not mention because they have been referred to by my Lord) which seem to shew that that was the opinion of the Courts in the cases which were before them. But then there are the two cases in the House of Lords to which my Lord has referred. I do not propose to refer to any but one of them—*Fulham Parish* v. *Woolwich Union*. (1) In that case the Lord Chancellor (Lord Loreburn) expressed the most clear and distinct opinion that s. 34 applies to all persons of whatever age and whether legitimate or not, and therefore he expressed a distinct opinion that the words of s. 34 cannot be qualified or read with s. 35 in the way that I think they should be read. One question is whether that was only a dictum or part of his judgment. If it was only a dictum this Court would not be bound by it, and it would become a question of grave consideration whether one was at liberty to disregard the dictum of such high authority as that of the Lord Chancellor sitting in the House of Lords. But in my opinion it is not a mere dictum; I think it is part of the reasoning of his judgment, because I see the argument addressed to him on behalf of the appellants in that case contained this point, amongst others: "Legitimate children cannot get a settlement of their own under the age of sixteen, and it would be strange if bastards could do so"—the argument in that case being that an illegitimate child could not acquire a settlement by residence under the provisions of s. 34. The argument, therefore, was that as it was clear that legitimate children could not get a settlement of their own under s. 34, it ought to be concluded that illegitimate children could not do so either, and it is in answer to that argument that the Lord Chancellor says this: "It is also clear that under the Act of 1846 (9 & 10 Vict. c. 66), if they resided in any union for a sufficient time, they could acquire a status of irremovability as distinguished from a settlement. And to my mind s. 34 of the Act of 1876 was intended to say, and did say, that all persons, of whatever age and whether legitimate or not, who had a status of irremovability should be also endowed with a settlement." Then he goes on to say "This is not really questioned, except

(1) [1907] A. C. 255.

as to illegitimate children." I do not understand that part of the judgment, because I have read from the argument a passage in which the learned counsel arguing for the appellants distinctly put the proposition before the House of Lords that legitimate children did not come within the provision. Then again the Lord Chancellor goes on: "But it is argued that the effect of s. 35 of the same Act was to qualify s. 34 and to make it inapplicable in the case of illegitimate children under sixteen. I cannot think so. The two sections deal with different subjects and are entirely consistent the one with the other." That, as I say, seems to me to be not only a dictum, but part of the reasoning and foundation of the judgment. It has been argued, says the judgment, if I may paraphrase it, that s. 34 does not apply to legitimate children, and that they cannot get a settlement from a status of irremovability in the way it was argued that an illegitimate child could under the circumstances. If they cannot, the argument must go on, an illegitimate child cannot. Then the judgment proceeds to say that the Lord Chancellor is of opinion that neither legitimate nor illegitimate children are excepted from the operation of s. 34. Therefore it seems to me to be part of the reasoning upon which his judgment was founded, and not merely a dictum which we are entitled to disregard, but a judgment by which I feel myself bound. That no doubt is strengthened by the fact that, as my Lord has pointed out, Lord Halsbury in the other case to which reference has been made—*West Ham Union* v. *Holbeach Union* (1)—not perhaps in so distinct terms, but certainly fairly distinctly, indicated the same opinion. Therefore, whatever my own opinion may be, I do not feel that I am at liberty to disregard this decision in the House of Lords, and therefore I agree with my Lord that our judgment must be for the appellants.

Appeal allowed.

F. O. R.

The Hackney Union appealed.

1911. Feb. 15. *Macmorran, K.C.*, and *Sydney Davey*, for the Hackney Union, argued as in the Court below. They cited, in

(1) [1905] A. C. 450.

C. A. 1911

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

addition, *Reg.* v. *Elvet* (1); *West Ham Union* v. *Bethnal Green Churchwardens.* (2)

Rawlinson, K.C., and *Herbert Davey*, for the Kingston-upon-Hull Incorporation, were not called upon to argue.

VAUGHAN WILLIAMS L.J. This appears to be a case of considerable difficulty. I am saying nothing new when I say that the statute law on the subject of poor law settlement has got into such a condition that it is extremely difficult to decide many of the questions which arise. It may be that the House of Lords, when these cases are brought to its notice, will see fit to promote legislation with a view to get rid of the difficulty, and I venture to express a hope that they will do so. Meanwhile, however, amid the difficulties and contradictions of the statute law, I think it my plain duty to follow the decision of the House of Lords. In the particular case before us I am fortunate in having the guidance of Lord Alverstone C.J., and I need only express my entire concurrence in the view which he has expressed so clearly.

I think it my duty, however, to refer shortly to the decisions upon which my own judgment is grounded. The question to be decided here is whether s. 34 of the Divided Parishes Act, 1876, is to be read as qualified by s. 35 of the same Act. In my judgment the section ought to be so read; but there is no doubt that Lord Loreburn has held the contrary in so many words. Taking first the case of *Fulham Parish* v. *Woolwich Union* (3), Lord Loreburn says: "Now it is to my mind clear that up to the time when the Act of 1876 (39 & 40 Vict. c. 61) was passed such children could acquire a settlement in certain circumstances. It is also clear that under the Act of 1846 (9 & 10 Vict. c. 66), if they resided in any union for a sufficient time, they could acquire a status of irremovability as distinguished from a settlement. And to my mind s. 34 of the Act of 1876 was intended to say, and did say, that all persons, of whatever age and whether legitimate or not, who had a status of irremovability should be also endowed with a settlement." That is very plain

(1) (1859) 2 E. & E. 266. (2) [1894] A. C. 230.
(3) [1907] A. C. 255, at p. 259.

language indeed as to the effect which follows from gaining a status of irremovability. Lord Loreburn proceeds: "This is not really questioned, except as to illegitimate children. But it is argued that the effect of s. 35 of the same Act was to qualify s. 34 and to make it inapplicable in the case of illegitimate children under sixteen. I cannot think so. The two sections deal with different subjects, and are entirely consistent the one with the other. My difficulty on this part of the case has not been how to decide, but how to appreciate the argument. I am sure it ought not to succeed." It seems to me on the real question before us that Lord Loreburn emphatically decides that one section is no qualification whatever upon the other. Going back to the case of *West Ham Union* v. *Holbeach Union* (1), I need only refer to the judgment of Lord Halsbury, who in *Fulham Parish* v. *Woolwich Union* (2) agreed with the view of Lord Loreburn and with his reasons for that view. Lord Halsbury said: "My Lords, in this case, if it were res integra, I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed, I am not sure that I would not go further than he does and strive to bring back the meaning of the word 'settlement' to the meaning it had when Bott and Lord Kenyon were its expositors; but the statute which has turned a 'status of irremovability' into a settlement has rendered such an effort impossible." That is a plain statement of the effect of s. 34 of the Act of 1876. Lord Halsbury goes on: "The case of *Reg.* v. *Elvet* (3), expounded as it was by your Lordships in this House, decides the question here in debate. Rightly or wrongly, this House has decided that unemancipated residence could found a settlement in the *Highworth Case*. (4) I see no answer to what the Master of the Rolls points out, that if a part of the residence while under sixteen may be available to make up the settlement, with what logic could it be suggested that the whole residence under sixteen cannot do so also. If that decision was wrong, we must abide by it till it is altered by an Act of Parliament." I have already expressed my own hope that the House of Lords may take the

(1) [1905] A. C. 450.
(2) [1907] A. C. 255.
(3) 2 E. & E. 266.
(4) 14 App. Cas. 465.

C. A. 1911

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Vaughan Williams L.J.

view that it is desirable that an amending statute should be passed.

Several other cases were cited to us in argument, and it was suggested that certain expressions in the judgments of certain of the members of the House of Lords would justify a conclusion different from that at which that House arrived in *Fulham Parish* v. *Woolwich Union*. (1) I think that those cases have nothing to do with the case before us. We must have regard to the latest decisions of the House of Lords, and it would not be respectful in this Court to point to observations made in earlier cases and say that they would lead to a different conclusion. We are, in my opinion, bound by the views expressed by the House of Lords, and this appeal must be dismissed.

FARWELL L.J. I agree. I have had but little experience of this particular class of case, and it would be unbecoming in me, under the circumstances, to express any strong opinion of my own. We are bound by the decisions of the House of Lords, and it must be regarded as settled law that s. 35 of the Act of 1876 only applies to persons who have not acquired a settlement under s. 34 of that Act.

KENNEDY L.J. I agree. I do not say that I should have differed from the judgment which would have been pronounced in the Divisional Court but for the view expressed by the House of Lords in the two recent cases which have been so much referred to. The Lord Chief Justice and Pickford J. felt that they were bound to follow that view, but Darling J. felt himself free to express his individual opinion. For myself, I express no opinion upon the merits of the case. I express no dissent from the arguments which commended themselves to all the members of the Divisional Court, but agree that the authority of the House of Lords in favour of the respondents to this appeal is clearly involved in the two recent decisions upon which reliance was properly placed. I venture to join with Vaughan Williams L.J. in the hope that, if this case goes to the House of Lords, the difficulty suggested by the appellants may cease to exist, and that

(1) [1907] A. C. 255.

the judgments in *Reigate Union* v. *Croydon Union* (1) and *Mitford and Launditch Union* v. *Wayland Union* (2) may be the subject of consideration; for I do not think that they are noticed in any of the judgments of their Lordships in the two cases which we must hold to be binding upon us.

Appeal dismissed.

C. A. 1911

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION.

Solicitors for Kingston-upon-Hull Incorporation: *Bell, Brodrick & Gray, for R. H. Winter, Hull.*

Solicitors for Hackney Union: *Stones, Morris & Stones.*

W. J. B.

CARLTON ILLUSTRATORS AND ANOTHER *v.* COLEMAN & COMPANY, LIMITED.

1910 *Nov.* 2, 3.

Copyright — Picture — Drawing — Reproduction without Author's Consent — "Alteration" — Coloured Enlargement — Penalties — Action to recover — Injunction — Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *ss.* 7, 8.

By s. 7 of the Fine Arts Copyright Act, 1862, (1.) no person shall fraudulently affix upon any painting, drawing, or photograph any name, initials, or monogram; (2.) no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph having thereon the name, initials, or monogram of a person who did not execute or make such work; (3.) no person shall fraudulently utter, dispose of, or put off any copy or colourable imitation of any painting, drawing, or photograph as having been made or executed by the author or maker of the original work; (4.) "Where the author or maker of any painting, drawing, or photograph . . . . shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker."

"Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds . . . ."

By s. 8, all pecuniary penalties which shall be incurred pursuant to

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(1) 14 App. Cas. 465. (2) 25 Q. B. D. 164.

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY.

the Act may be recovered either by action against the party offending, or by summary proceeding before two justices.

In order to constitute an "alteration" in a drawing within the meaning of s. 7, clause 4, the alteration must be a material one having regard to the object of the enactment. An alteration in a drawing which might affect the reputation of the author of the drawing as an artist would be a material alteration and would therefore come within the section. To bring the case within the clause it is not necessary that the sale or publication of the altered work should be fraudulent; it is sufficient if the sale or publication of the altered work as or for the unaltered work of the author is made knowingly.

The plaintiff, who was an artist, made a fine line drawing, which bore his signature, for the defendants for the purpose of being used by them as an advertisement for a certain preparation in which they dealt. The defendants, in whom the copyright of the drawing vested, had the drawing, without the plaintiff's consent, enlarged and coloured, and caused copies of the enlargement with the plaintiff's name thereon to be exhibited in the form of posters as an advertisement of their preparation. In an action by the plaintiff to recover a penalty for infringement of s. 7, clause 4, of the Act by the publication of copies of the drawing so altered as or for the unaltered work of the plaintiff, and for an injunction, evidence was given that the alteration and colouring of the drawing were such as would be damaging to the plaintiff's reputation as an artist:—

Held, that as the alteration in the drawing might be damaging to the plaintiff's reputation as an artist, the defendants had committed a breach of s. 7, clause 4; that the plaintiff was entitled to bring an action, under s. 8, to recover a penalty for the breach; and that the plaintiff was also entitled to an injunction to restrain future breaches.

TRIAL of action before Channell J. without a jury.

The plaintiffs, Carlton Illustrators, were a firm consisting of a number of artists and carrying on the business of making and selling illustrations for the use of advertisers and others. The plaintiff Garth Jones (1) was an artist and a member of the firm. The defendants were a company engaged in the making, advertising, and selling of a preparation called Wincarnis.

The plaintiffs, Carlton Illustrators, entered into a contract in writing with the defendants to make or procure to be made for the defendants a fine line drawing for the purpose of being used by them for advertising Wincarnis. It was intended by both

(1) The action was originally brought in the name of Carlton Illustrators alone as plaintiffs, but subsequently Garth Jones was added as a plaintiff.

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY.

parties that the drawing should be made by Garth Jones, and the defendants agreed to pay the sum of four guineas for it. Garth Jones accordingly made a fine line drawing in black and white depicting the classical figure of a woman and entitled "Caution," the signature "Garth Jones" being on the drawing. The agreement contained no reservation of copyright in the author. The drawing was delivered to the defendants.

The plaintiffs in their statement of claim alleged that, after they had parted with the possession of the drawing, the defendants circulated posters purporting to be copies thereof, and caused alterations and additions of colour and drawing (made by a person or persons other than the plaintiff Garth Jones) to be made therein, and published such copies so altered as or for the unaltered work of Garth Jones without the consent of the plaintiffs; and that in wrongfully printing the signature "Garth Jones" on such posters the defendants ascribed such altered work to the plaintiffs.

The statement of claim asked, so far as material, for (1.) penalties; (2.) an injunction to restrain the defendants from making or publishing the said fine line drawing with alterations or additions of colour and drawing, made without the consent of the plaintiffs, as or for the unaltered work or production of the plaintiffs.

It appeared that when the drawing was delivered to the defendants they had it, without the consent of the plaintiffs, enlarged by a photographic process and coloured, and the defendants caused copies of this coloured enlargement with the name "Garth Jones" upon them to be extensively displayed as posters on hoardings and elsewhere in London and the provinces. They also sent to their retail customers the following letter:—"Dear Sir,—Within the next two weeks practically every hoarding in London and the provinces will contain a beautiful allegorical poster by Garth Jones. Several thousand pounds are being spent and naturally an increased business will follow. It is advisable therefore that your stock of Wincarnis should be large enough to meet the extra demand that is sure to take place. We take this opportunity of thanking you for past favours, and shall be glad if you will fill up the enclosed form and return to

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY.

us at your convenience, when your instructions will receive our prompt attention."

The evidence of Garth Jones was to the effect that the drawing had been altered both in line and by being coloured; that the face in the drawing was changed; that it shewed as part of the coloured drapery of the figure of the woman what he had intended to be part of the bank on which she was sitting; that he had not contemplated that the drawing would be coloured, and if he had his treatment would have been different; and that the enlargement of the drawing as coloured and altered, with his name upon it, would be damaging to his reputation. Two artists were called for the plaintiffs and gave evidence that the drawing had been altered in an inartistic way, and that in their opinion the alterations and the colouring on the poster were damaging to Garth Jones's reputation as an artist. No evidence was called for the defendants.

Nov. 2. *Buckmaster, K.C., J. D. Crawford,* and *T. Artemus Jones,* for the plaintiffs. The claim against the defendants is to recover penalties under s. 7, clause 4, of the Fine Arts Copyright Act, 1862 (1), for having, without the consent of Garth Jones,

(1) 25 & 26 Vict. c. 68, s. 7: "No person shall do or cause to be done any or either of the following acts; that is to say,

"First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

"Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

"Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken:

"Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person

the author of the drawing, made alterations therein and knowingly published copies of the drawing so altered as or for the unaltered work of the author. It is admitted that the copyright in the drawing is in the defendants, but s. 7 does not deal with infringement of copyright. A person who owns the copyright in a drawing may bring himself within that section. The first three clauses of s. 7 deal with fraudulent acts. In clause 4 the word "fraudulently" is omitted, and the prohibition, so far as material, is against knowingly publishing, without the consent of the author, any copies of a drawing, which has been altered by a person other than the author, as or for the unaltered work of the author. It is not suggested that there was any fraudulent intent on the part of the defendants, but they knowingly caused the drawing as altered by their orders into an enlarged coloured poster to be published as being the work of Garth Jones, his name being on it. The plaintiffs probably could not have complained of an accurate enlargement of the drawing in black and white, but the enlargement here was inaccurately done and was coloured, and the alteration was calculated to injure the reputation of Garth Jones as an artist in line drawing. The mere addition of colour to a line drawing would be an "alteration"

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shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker:

"Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited . . . ."

Sect. 8: "All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore and in any such Act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant . . . . as follows:

"In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides . . . ."

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY.

within the meaning of clause 4. The case therefore comes within clause 4 of s. 7. That being so, he plaintiffs, or at any rate Garth Jones, can recover the penalties in this action. Though s. 7 provides that every "offender" under the section shall "upon conviction" forfeit a penalty to the person aggrieved, s. 8 gives an alternative remedy for recovery of the penalty by action against the party offending. The Act has created the offence and has provided two alternative remedies for it. The penalty being recoverable in respect of a past breach of the section, the plaintiffs are also entitled to an injunction to prevent future breaches: *Cooper* v. *Whittingham* (1); *Attorney-General* v. *Ashborne Recreation Ground Co.* (2) The plaintiffs are willing to accept the defendants' undertaking in lieu of an injunction.

J. R. Atkin, K.C., and *J. Bromley Eames*, for the defendants. The plaintiffs, Carlton Illustrators, have no cause of action. Sect. 7, clause 4, of the Fine Arts Copyright Act, 1862, protects the author or maker of the drawing, and Garth Jones is the author or maker of this drawing, and not the Carlton Illustrators. Next, the defendants are the owners of the copyright in the drawing, and are entitled to reproduce it in any style, size, or colour they please. This is clear from s. 1 of the Act. Sect. 7, in all its four clauses, deals only with fraudulent acts, and does not affect the right of reproduction which the owner of the copyright has. The words "offender" and "conviction" in the section as applicable to all four clauses shew this. There is no suggestion that the defendants were in any way fraudulent in having this fine line drawing reproduced in an enlarged form and published as a coloured poster. There is no substantial alteration in the drawing. The lines said to represent a bank on which the figure of the woman is sitting might naturally be taken to be part of the draperies. The lines added for purposes of shading are too slight an alteration to be regarded. The onus of shewing that the defendants "knowingly" published the altered drawing as or for the unaltered work of the author is on the plaintiffs, and they have not discharged that onus.

Even if the defendants are within clause 4 of s. 7, the penalty

(1) (1880) 15 Ch. D. 501. (2) [1903] 1 Ch. 101, at p. 107.

can only be recovered by summary proceedings before two justices. The words "offender" and "conviction" shew that the proceedings for the recovery of the penalty are intended to be in the nature of criminal proceedings. Sect. 8, which allows pecuniary penalties to be recovered by action, refers to the penalties imposed by s. 6 upon infringement of copyright, where the word "conviction" is not used. Nor are the plaintiffs entitled to an injunction. The Act has created the offence and has provided the remedy, and that is the only remedy.

Buckmaster, K.C., in reply.

Nov. 3. CHANNELL J. This is an action based upon s. 7, clause 4, of the Fine Arts Copyright Act, 1862, and so far as I know there has been no decision upon this particular clause during the forty-eight years in which the Act has been in operation.

The facts are these. The action is brought by a firm which trades under the name of the Carlton Illustrators, and the plaintiff Garth Jones is one of the members of the firm. Originally the firm were the sole plaintiffs, but after the action had proceeded for some time Garth Jones was added as a plaintiff. I may say at once that the firm have established no cause of action at all, and that is practically admitted. The firm as a firm are not entitled to any relief, because the section gives the right to the author or maker of any painting, drawing, or photograph, and Garth Jones was the author or maker of the drawing in question, though as between him and the firm the latter may, perhaps, have some rights. Garth Jones prepared a fine line drawing for the defendants, who were the proprietors of Wincarnis, for advertisement purposes, and he was paid for it. The effect was to transfer the copyright in the drawing to the defendants. There was nothing specified in the correspondence as to the mode in which the drawing should be reproduced; there was certainly nothing equivalent to a contract that the defendants should be entitled to reproduce it in the form of a coloured poster. The defendants simply acquired the copyright in the drawing, and they did not acquire by contract any right to publish a reproduction of the drawing in any particular form other than

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY, LIMITED.

Channell J.

that which they would have as the owners of the copyright. The defendants reproduced the drawing in the form of a large coloured poster, and upon that coloured poster they put, as there had been on the original drawing, the name of Garth Jones. They thereby undoubtedly represented that the coloured poster was the work of Garth Jones. If any representation outside the advertisement itself were required to bring the case within s. 7 of the Act, a statement was contained in a circular, issued by the defendants to chemists and others, that "within the next two weeks practically every hoarding in London and the provinces will contain a beautiful allegorical poster by Garth Jones." They were therefore to a certain extent using the reputation of Garth Jones to enhance the value of their advertisement, and to suggest that chemists should lay in a large stock of Wincarnis. There can be no doubt therefore that in those two ways they represented the coloured poster to be the work of Garth Jones. There has obviously been an alteration in the drawing, though I express no personal opinion about the artistic effect of it. No one can look at the drawing and the poster without seeing that the expression on the woman's face is entirely different in one from the other. There are also one or two minor alterations in addition to one which is especially relied upon by the plaintiff as constituting an alteration within the meaning of the Act, namely, putting the drawing into a coloured form. The evidence of Garth Jones and of the two artists who were called on behalf of the plaintiffs was to the effect that the alterations in the drawing were done in an inartistic way, and were such as would affect Garth Jones's reputation as an artist.

Those are the facts which give rise to the complaint. The first point which is made on behalf of the defendants is that clause 4 of s. 7 of the Fine Arts Copyright Act, 1862, as well as clauses 1, 2, and 3, relates to fraudulent alterations. I do not think so. Clause 1 prohibits the fraudulent affixing of any name, initials, or monogram upon any painting, drawing, or photograph. Clause 2 prohibits the fraudulent sale, publication, or exhibition of any painting, drawing, or photograph having thereon the name, initials, or monogram of a person who did not execute or make the work. Clause 3 prohibits the fraudulent

disposal of a copy or colourable imitation of any painting, drawing, or photograph as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken. Those three sub-sections expressly state that the act aimed at is a fraudulent act. Clause 4 does not mention fraud. It provides that "where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker." That is a kind of statutory prohibition against what is commonly known as a passing off of the goods of one person as the goods of another. The word in this clause is "knowingly," not "fraudulently," and therefore to bring a case within clause 4 there must be knowingly a publishing of the altered work as or for the unaltered work of the author or maker. The section then says that "Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds." That does not imply that there must be something fraudulent in the act. It is an instance of that which appears in many modern statutes, namely, something is expressly forbidden, and a penalty is imposed for a breach of that prohibition, making it an offence. There may be no moral turpitude attaching to the act, but the doing intentionally and knowingly of that which is forbidden by the Act is properly called an offence and the person who does it an "offender." The omission of the word "fraudulently" in clause 4 after its express mention in the first three clauses shews that the act aimed at in clause 4 need not be a fraudulent act.

There is therefore a breach of the provisions of clause 4 of s. 7 if a person knowingly publishes as or for the unaltered work of the artist a work which has been altered within the meaning of the enactment. "Alteration" is a word with a somewhat wide

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY, LIMITED.

Channell J.

meaning, and in construing it one must always have regard to the maxim "de minimis non curat lex." It is quite possible that there may be some alterations which would not be alterations within the meaning of clause 4. For instance, I do not think that an alteration in the form of the artist's signature would come within the enactment. It would be an alteration not material to the object of the enactment. To come within the enactment an alteration must be a material alteration having regard to the object with which the enactment was passed; and that which would be material in that sense would be an alteration which might affect the credit and reputation of the artist. To my mind that is what is prohibited. I do not think that it would be necessary to find in any particular case that the alteration had affected the character and reputation of the artist; it is sufficient if the alteration is of such a character that it might affect his character and reputation.

Applying that principle, I think that this case comes within clause 4 of s. 7. It is contended that merely putting colour to a drawing which was uncoloured would be an alteration within the clause. I do not think that I can say that that would necessarily be so in all cases. To my mind it must depend upon the particular circumstances of each case whether or not it amounts to a material alteration. I can quite appreciate that an artist might say that if he had understood that his drawing was going to be put into the form of a coloured poster he would have worked out a different style of drawing and made it appropriate for that purpose. It may be true that in the majority of cases the publication of a drawing which has been put into the form of a coloured poster with the artist's name upon it in such a way as to represent that he is responsible for the poster would be an alteration within the meaning of clause 4. One must remember that the owner of the copyright has an undoubted right, subject to the provisions of this clause, to make any alteration he pleases in the drawing, provided that he thereby makes no false representation to the public as to the authorship of the drawing. If it was originally a coloured drawing the putting of different colours on it would obviously be an alteration within clause 4. But the mere addition of colour to a drawing which has got no colour on

it would not, I am inclined to think, necessarily in all cases be an alteration within the meaning of the clause, although in the majority of cases it probably would be so. If it could be said that by no possibility could it affect the credit and reputation of the artist, or if it was obvious that it was not represented that the colour was the work of the artist, but that the design only was by the artist and the colour by somebody else, then the case would not come within the clause. Upon the facts of this case, the colour being a very important element in the poster, I come to the conclusion that there is such an alteration in the drawing as to bring the case within clause 4.

The next question is whether the defendants knowingly published the poster as or for the unaltered work of Garth Jones—knowing, that is to say, that the drawing had been so altered as not to be his work. I have had some evidence of this on behalf of the plaintiffs, and no evidence to contradict it, and therefore I am bound to find that the defendants knowingly published the poster as or for the unaltered work of Garth Jones. There has therefore been a breach of clause 4 of s. 7.

I now come to the question whether the action is maintainable for penalties. Sect. 7, after specifying the four cases I have already mentioned, enacts that "Every offender under this section"—that includes all the branches of the section—"shall upon conviction forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited." That undoubtedly, if it stood alone, would imply that there must be summary proceedings before justices and a conviction resulting therefrom. But s. 8 enacts that "all pecuniary penalties which shall be incurred and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore and in any such Act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant or the complainer, as follows: In England and Ireland, either by

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY, LIMITED.

Channell J.

action against the party offending or by summary proceeding before any two justices having jurisdiction where the party offending resides." Those two sections must be read together. The first says that every offender—that is to say, every person who commits a breach of the provisions of the section—shall upon conviction forfeit to the person aggrieved a penalty. Sect. 8 makes it quite clear that the conviction is to be by summary proceedings before two justices. That therefore is one way in which the penalty may be recovered. Sect. 8 gives an alternative remedy. It provides that the penalty may be recovered by action against the party offending. The provision that the offender shall upon conviction forfeit a penalty to be recovered before two justices is not inconsistent with the provision that the penalty may in the alternative be recovered by action. Therefore the action is maintainable for the penalty.

The plaintiff also asks for an injunction to prevent the future commission of breaches of this statutory enactment. It was argued, though not very strenuously, that the only remedy was the recovery of the penalty. I think that this case comes within the rule that, where there is a statutory enactment in favour of a person, and there is a penalty for the breach of the statutory enactment which goes to the person aggrieved, in such a case the penalty is the only remedy for the breach. That principle, however, only applies to remedies for the breach which has been committed, and an injunction is not a remedy for the past breach, but is a means for preventing further breaches. In *Cooper* v. *Whittingham* (1) it was decided by Jessel M.R. that where a statute creates a new offence and imposes a penalty for it the ancillary remedy by injunction may still be claimed. My impression is that that has been acted upon more than once; and at any rate in *Attorney-General* v. *Ashborne Recreation Ground Co.* (2) Buckley J., after quoting the passage from the judgment of Jessel M.R. in *Cooper* v. *Whittingham* (1), deliberately acted upon it. So that there are at least two cases, and I am strongly under the impression that there are more, which establish that, where there has been a breach of a statutory enactment as to which the sole remedy provided is a penalty, an

(1) 15 Ch. D. 501. (2) [1903] 1 Ch. 101, at p. 107.

1910

CARLTON ILLUSTRATORS v. COLEMAN & COMPANY, LIMITED.

Channell J.

injunction may be granted to prevent future breaches; and I think that the authorities shew that if there is a probability of the breach being repeated the injunction should be granted. I think that in the circumstances of this case the plaintiff is entitled to an injunction, or, as I understand the defendants are willing to offer and the plaintiff to accept, an undertaking.

I therefore give judgment for the plaintiff Garth Jones for one penalty of 10*l.*, and the defendants will give an undertaking in lieu of an injunction.

Judgment accordingly.

Solicitors for plaintiffs: *Chamberlain & Co.*
Solicitors for defendants: *Blair & W. B. Girling.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

1911

Feb. 3, 17, 24.

G. FREEMAN & SONS *v.* CHESTER RURAL DISTRICT COUNCIL.

Arbitration—Contract for Works—Action by Contractor—Reference of Disputes to Officer of other Contracting Party—Staying Proceedings—Attack on Conduct of Arbitrator — Discretion of Court — Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

Where a contractor brought an action to recover the price of certain works constructed for a local authority under a contract which provided for the reference of disputes thereunder to the engineer of the local authority, and, in answer to a summons to stay proceedings under s. 4 of the Arbitration Act, 1889, challenged the conduct of the engineer in relation to the works, the question in dispute being whether the engineer had not precluded himself by his own admissions from asserting that the works had not been completed to his satisfaction and that the period of maintenance had not expired:—

The Court (Cozens-Hardy M.R. and Buckley L.J.) (affirming the decision of Lush J.), in the exercise of the jurisdiction conferred upon it by the Arbitration Act, 1889, refused to order the action to be stayed; Cozens-Hardy M.R. on the ground that the cross-examination of the engineer was essential to the proper determination of the dispute; Buckley L.J. on the ground that, though in his opinion the evidence failed to shew that the engineer had unfitted himself to act as arbitrator,

C. A.
1911
G. FREEMAN & SONS v. CHESTER RURAL COUNCIL.

yet the fact that one judge of the Court of Appeal was not "satisfied that there was no sufficient reason why the matter should not be referred" was a ground upon which another judge of co-ordinate jurisdiction could concur in the view that an absence of a sufficient reason was not shewn.

APPEAL from an order of Lush J. in chambers.

The action was brought to recover a sum of 10,700*l.* odd, the balance of moneys alleged to be due to the plaintiffs from the defendant council for work done and materials supplied in connection with certain sewerage works executed by the plaintiffs for the council in the townships of Christleton and Great Boughton under two contracts dated May 3, 1903.

The plaintiffs had already received on account sums amounting in the aggregate to 9858*l.* in respect of these contracts.

The defendant council took out a summons for a stay of proceedings under s. 4 of the Arbitration Act, 1889.

The conditions in the two contracts were in all material respects identical.

Clause 24 provided, so far as material, as follows: "And in case of any doubts, disputes or differences arising or happening, touching or concerning the works or any of them, or relating to the quantities, quality, description or manner of work done, executed, or to be done and executed by the contractor, or to the quantity or quality of the materials to be employed therein, or in respect to any additions, deductions, alterations or deviations made in, to, or from the works, or any part of them; or touching or concerning the meaning or intention of this specification, or of any part thereof, or of the contract entered into by and between the council and the contractor . . . . or touching or concerning any certificates, orders or awards which may have been made by the engineer, or in anywise whatsoever relating to the interests of the council, or of the contractor in the premises; such doubts, disputes or differences, shall from time to time be referred to, and be settled and decided by the engineer, who shall be competent to enter upon the subject-matter of such doubts, disputes or differences with or without formal reference or notice to the parties to the contract or either of them, and who shall judge, decide, order and determine thereon; and to the

engineer shall also be referred the settlement of the said contract and the determination of the sum or sums, or balance of money to be paid to or received from the contractors by the council; and the . . . . certificates, orders and awards of the engineer . . . . shall be final and binding upon the council and the contractors respectively, and shall not be set aside or attempted to be set aside by reason or on account of any technical or legal defects therein or in this specification, or in the contract founded thereon, or on account of any informality, omission, delay or error of proceeding in or about the same or any of them, or relative thereto, or on any other ground or for any other reason, or otherwise howsoever."

Clause 28 related to delivery of the works and provided that such delivery should not be deemed a full, complete, and sufficient delivery by the contractor to the council, unless and until a certificate in writing under the hand of the engineer should have been given to the council to the effect that the works constructed by the contractor had been examined by him and that such works were in a sound, watertight, workmanlike, complete, and serviceable condition, and that the contractor had, in the opinion of the engineer, reasonably fulfilled and completed his contract and undertaking.

Clause 29 provided a six months period of maintenance from the date of the last-mentioned certificate.

Clause 30 provided that the contractor should find sureties for a sum not exceeding one-fourth of the amount of the accepted tender for the due fulfilment of the contract and for the due completion and delivery of the works.

Clause 32 provided for monthly payments as the works proceeded up to 90 per cent. of the contract price.

Clause 33 provided for the payment to the contractor of 5 per cent. of the contract price within one month of completion and for the retention by the council of the balance until the completion of the period of maintenance, at the expiration of which period the balance so retained was to be paid to the contractor on the presentation of a certificate from the engineer that the works were in a perfectly sound condition and that the terms of the contract were completed.

C. A. 1911

G. FREEMAN & SONS v. CHESTER RURAL COUNCIL.

Clause 1 provided that the word "engineer" in the specification should mean Frank Edward Priest, M.Inst.C.E.

Priest was a consulting engineer of Liverpool.

The substantial questions in dispute, as disclosed by the affidavits upon the summons to stay and the exhibits thereto, were whether the works had been completed to the satisfaction of the engineer and whether the period of maintenance had expired. The case made by the defendant council was that the works had not yet been completed to the engineer's satisfaction pursuant to clause 28 of the conditions and that he had not given to the council the certificate mentioned in that clause; that the council were calling upon the plaintiffs to relay a portion of the sewers which they had constructed owing to defective workmanship; that on January 28, 1909, the engineer received from the plaintiffs particulars of their claim in this action in respect of the Great Boughton contract, and that on July 23, 1909, he received particulars of their claim in respect of the Christleton contract; that these claims were very voluminous and involved an immense amount of labour; that his duties were rendered more onerous by the fact that the opening up of some of the sewers since the receipt of the particulars had revealed serious defects; that in a letter dated September 23, 1910, from the engineer to the plaintiffs he stated the amounts of the final measurements as follows: Christleton, 4708*l.* 17*s.* 1*d.*; Great Boughton, 5435*l.* 14*s.* 10*d.*, but expressed his willingness to see the plaintiffs at his office with a view to the consideration of any of the items; that the defendant council had already paid to the plaintiffs 5453*l.* in respect of the Christleton contract and 4405*l.* in respect of the Great Boughton contract on the engineer's certificates, but that the engineer had not issued any final certificate pursuant to clause 33; and the council disputed the right of the plaintiffs to recover any money except upon the certificate of the engineer, and submitted that in the circumstances above mentioned no reason was shewn why the disputes between the parties should not be referred to the engineer under clause 24 of the conditions.

The plaintiffs' case was that the works were constructed under the supervision of the engineer and his assistants; that in 1905

portions of the sewers had been relaid to satisfy the requirements of the engineer; and that the works were completed to his satisfaction at the end of 1905; and they relied upon a letter written by the engineer to them on February 8, 1906, in answer to a request by them for a final certificate. In that letter he said: "I think it would be proper to say that both contracts were finished on the 1st January last and therefore I am taking that as the date of completion . . . . As to the certificate for which you ask I should like to have first from you your final claim for both contracts. In the monthly claims which I have received there appear to be many items as to which there will be wide differences between your claim and the amounts which, without further investigation, appear proper to me, and therefore before issuing any further certificate I think it right that I should have the final claim before me so that the whole matter might be investigated." The plaintiffs further alleged that in December, 1905, they applied to the engineer to arrange for the repayment of a sum of 2000*l.* which they had deposited at a bank in lieu of sureties for the due fulfilment of the contracts, and that on January 3, 1906, the engineer replied that this sum could not be refunded until after the period of maintenance; that on July 23, 1906, the plaintiffs again asked him to make the necessary communication to the clerk of the council for the repayment of the money, as the period of maintenance had now expired; that on July 24 the engineer replied that he had written to the clerk as requested, and that this sum was shortly afterwards refunded. The plaintiffs further alleged that in July, 1909, the defendant council complained that certain lengths of the sewers constructed by the plaintiffs were defective; that in October, 1909, the plaintiffs saw the engineer with reference to this complaint, and that he then stated positively that the whole of the plaintiffs' work in respect of the sewers so complained of was wrong and that his mind was made up on that point; that in December, 1909, the defendant council called upon the plaintiffs to make good the alleged defects at their own expense, alleging for the first time that the period of maintenance had not expired. In these circumstances the plaintiffs submitted that Priest was not a

C. A.
1911
G. FREEMAN & SONS v. CHESTER RURAL COUNCIL.

proper person to act as arbitrator to settle the disputes which had arisen. In an affidavit in reply Priest denied that the works had been completed to his satisfaction or that he had given the certificates required by clauses 28 and 33 or that he had in any way disqualified himself from acting impartially as arbitrator.

The Master refused to order the action to be stayed and his refusal was affirmed by Lush J.

The defendant council appealed.

Atkin, K.C., and *Hon. M. Macnaghten*, for the appellants. The matters in dispute clearly fall within the arbitration clause, and prima facie the appellants have the right to have these disputes decided by the person to whom the contractors have agreed to refer disputes under the contract. The fact that the engineer may have already formed an opinion upon the matters in dispute is not a ground for saying that he is disqualified from acting as arbitrator, where no attack is made upon his character: *Jackson* v. *Barry Ry. Co.* (1); *Ives & Barker* v. *Willans.* (2) *Robert W. Blackwell & Co., Ld.* v. *Borough of Derby* (3) was an exceptional case and is distinguishable because (1.) the arbitrator in that case was charged with unreasonable conduct and (2.) he was a permanent official of the local authority. It is not an answer to the appellants' case to say that the defects complained of ought to have been discovered by the clerk of the works or the engineer during the progress of the works. The period of completion and the period of maintenance depend on the certificates of the engineer, which have not yet been given, and by the terms of the contract he is made the judge of the time at which those certificates should be given.

Holman Gregory, K.C., and *R. M. Montgomery*, for the respondents. The engineer has fixed the date of completion of both contracts at January 1, 1906, and has admitted that the period of maintenance has expired, and it is startling that in the face of those admissions he should now swear that the work

(1) [1893] 1 Ch. 238, 245.
(2) [1894] 2 Ch. 478.
(3) (1909) Supplement to Hudson on Building Contracts, 3rd ed., p. 23.

has not been completed to his satisfaction. The appellants have used the sewers for three years, they have taken possession and accepted the work, and it is now too late to make the contractors liable for defects. Moreover, the engineer saw the work during its progress and passed it. It is essential in order that justice should be done to the contractors that the engineer should be cross-examined as to the matters in dispute, and, where there is good reason to suppose that justice will not be done in the arbitration, having regard to the events which have occurred since the making of the contract, it is the duty of the Court, in the exercise of its discretion, to refuse to stay the action: *William Kennedy, Ld.* v. *Borough of Barrow-in-Furness.* (1) The necessity for cross-examining the arbitrator was one of the grounds on which the Court proceeded in *Robert W. Blackwell & Co., Ld.* v. *Borough of Derby.* (2) Here the contractors have been paid more on one of the contracts upon the interim certificates of the engineer, which must not exceed 90 per cent. of the amount of the contract, than the total amount which he ultimately allowed. These facts shew that the engineer is not a proper person to act as arbitrator, and afford a strong ground for saying that the matters in dispute ought to be dealt with by an independent tribunal.

Atkin, K.C., in reply. There is here no question of bad faith, and the nature of the dispute is exactly that which the parties contemplated would be decided in the manner agreed by the contract. The parties have trusted this particular man to decide fairly, and nobody has said that he will not; and if the parties agree to adopt a domestic forum, instead of resorting to the ordinary Courts, prima facie it is the duty of the Court to act upon that agreement: *Willesford* v. *Watson.* (3)

[At the conclusion of the arguments the Court directed the case to stand over in order to give the parties an opportunity of agreeing upon an independent arbitrator, but on February 17, the appellants having by their counsel intimated that they desired to have the judgment of the Court upon the appeal, judgment was reserved.]

(1) (1909) Supplement to Hudson on Building Contracts, 3rd ed., p. 15.

(2) Ibid., p. 23.

(3) (1873) L. R. 8 Ch. 473.

C. A. 1911

G. FREEMAN & SONS v. CHESTER RURAL COUNCIL.

Feb. 24. COZENS-HARDY M.R. This is an application by the defendants under s. 4 of the Arbitration Act, 1889, for an order to stay all further proceedings. The plaintiffs sued the defendants for large sums alleged to be due to them under two contracts for the construction of sewers and other works. Clause 24 of the specification is an arbitration clause in the widest possible terms, in which Mr. Priest, the engineer, is the person to settle and decide all disputes, including any orders or awards made by himself. Now it is clear that prima facie the Court would give effect to such an agreement, but the Court has a discretion. The language of s. 4 is somewhat peculiar. It says that "If the Court is satisfied that there is not sufficient reason why the matter should not be referred the Court may make an order staying the proceedings." In the present case Master MacDonell refused to make the order, and Lush J. dismissed an appeal from that order. In the face of these decisions I think we ought to hesitate before granting a stay. I am not satisfied that there is not sufficient reason why the matter should not be referred. The conduct of Mr. Priest himself is challenged in the action. I have a difficulty in seeing how the matter can be properly dealt with without the cross-examination of Mr. Priest, and it is obviously impossible to allow the arbitrator to be cross-examined by one of the parties to the arbitration. In saying this I desire not to be understood as casting any imputation upon Mr. Priest. I imagine that he will be relieved to find that his conduct will be submitted to another tribunal.

In my opinion we ought not to differ from Lush J., and I think the appeal must be dismissed, the costs of the appeal being the plaintiffs' in any event.

BUCKLEY L.J. I so entirely agree with the robust good sense of Bowen L.J.'s language in *Jackson* v. *Barry Ry. Co.*(1) that if this matter had been for my judgment alone I should have been of opinion that this appeal ought to be allowed and an order made to stay proceedings. I cannot find that Mr. Priest "has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously

(1) [1893] 1 Ch. 238, 247.

formed or even strong views, but as an honest judge of this very special and exceptional kind." To succeed the contractors must, in the language of Lindley L.J. in *Ives & Barker* v. *Willans* (1), "attack the character of the engineer to such an extent, and in such a manner, as to shew that the engineers will probably be guilty of some misconduct in the matter of the arbitration; that they will not act fairly." There is, I think, no such evidence in this case.

But the matter does not turn solely upon an investigation whether under the terms of the contract the parties are bound to accept the contractual arbitrator. It remains that s. 4 of the Arbitration Act, 1889, gives a discretion, and that in two ways, namely, (1.) the words are permissive, not imperative, for the verb is "may make," not "shall make," and (2.) the jurisdiction to stay the proceedings arises if the Court is "satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission." Over and above the contractual rights, therefore, there exists this discretion in the Court. The Master of the Rolls is not satisfied that there is no sufficient reason why the matter should not be referred. Under these circumstances I do not think that the fact that another judge of co-ordinate jurisdiction thinks otherwise establishes that there is no sufficient reason when one judge of the Court of Appeal is not satisfied on that point. From this point of view I can concur with the order which the Master of the Rolls has proposed.

The decision of Fletcher Moulton L.J. and myself in *Robert W. Blackwell & Co., Ld.* v. *Borough of Derby* (2) was not rested upon any grounds different from those which prevailed in *Jackson* v. *Barry Ry. Co.* (3) and *Ives & Barker* v. *Willans.* (4) In that case I thought that the arbitrator could not be a proper judge where the question between the parties was whether he had acted unreasonably in the discharge of his duties. I rested my decision upon the words in s. 4 of the Arbitration Act to which I have just referred. In that case I was a judge not satisfied

(1) [1894] 2 Ch. 478, 488.
(2) (1909) Supplement to Hudson on Building Contracts, 3rd ed., p. 23.
(3) [1893] 1 Ch. 238.
(4) [1894] 2 Ch. 478.

C. A. 1911

G. FREEMAN & SONS v. CHESTER RURAL COUNCIL.

that there was no sufficient reason why the matter should not be referred.

Appeal dismissed.

Solicitors for appellants: *Davenport, Cunliffe & Blake, for W. H. Churton & Sons, Chester.*

Solicitors for respondents: *Fowler & Co., for Grundy, Lamb & Grundy, Manchester.*

H. B. H.

1911 *Feb.* 13.

NEWMAN *v.* OUGHTON; POND & OUGHTON, CLAIMANTS.

Pawnbroker—Loan of 50l. on Bill of Sale—Business of Money-lending—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 6 (*a*)—*Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 10.

The fact that a pawnbroker has on one occasion lent money on the security of a bill of sale does not make him a money-lender within the meaning of the Money-lenders Act, 1900.

POINT of law arising in an interpleader issue.

The plaintiff, having recovered judgment against the defendant for a sum of money, issued execution upon his goods. The goods seized were claimed by Pond & Oughton, a firm of pawnbrokers, on the ground that they were included in a bill of sale of which Pond & Oughton were the grantees and the defendant was the grantor. The plaintiff did not admit the claim, and an interpleader issue was directed, to be tried by a Master of the King's Bench Division.

At the trial of the issue it appeared that the bill of sale had been given as security for an advance of 50*l.* made by the claimants to the defendant. It was thereupon contended on behalf of the plaintiff that an advance of 50*l.* on a bill of sale by a pawnbroker was not "business carried on by him in accordance with the provisions of" the Pawnbrokers Act, 1872, and that, as the claimants were not registered money-lenders, the transaction was void under the Money-lenders Act, 1900. (1)

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6: "The expression 'money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces

1911

NEWMAN v. OUGHTON.

In order to obtain a speedy decision on this point of law, an application was made to the Divisional Court for leave to treat the Master's note of the facts as a special case raising the question. Leave was granted, and the case accordingly came on for argument.

There was no evidence that the claimants had on any other occasion advanced money on the security of a bill of sale, or otherwise than in connection with their pawnbroking business.

Frank Dodd, for the plaintiff. A pawnbroker is a person whose business is that of money-lending, and he is, therefore, prima facie a money-lender within the Money-lenders Act, 1900; but in so far as a pawnbroker carries on his business in accordance with the Pawnbrokers Act, 1872, that is to say, confines himself to advancing sums not above 10*l.*, he is exempted by s. 6 (*a*) of the Act of 1900 from the necessity of complying with the provisions of the Act as to registration and so forth. A pawnbroker who advances more than 10*l.*, or lends money on the security of a bill of sale, is not carrying on business in

himself or holds himself out in any way as carrying on that business; but shall not include—

"(*a*) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers."

Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 5: "In this Act, 'pawnbroker' includes every person who carries on the business of taking goods and chattels in pawn."

Sect. 10: "This Act shall apply—

"(1.) To every loan by a pawnbroker of forty shillings or under:

"(2.) To every loan by a pawnbroker of above forty shillings and not above ten pounds, except as in this Act otherwise provided in relation to cases where a special contract respecting the terms of the loan (as authorised by this Act) is made between the pawner and the pawnbroker at the time of the pawning.

"Nothing in this Act shall apply to a loan by a pawnbroker of above ten pounds, or to the pledge on which the loan is made, or to the pawnbroker or pawner in relation to the loan or pledge; and, notwithstanding anything in this Act, a person shall not be deemed a pawnbroker by reason only of his paying, advancing, or lending on any terms any sum or sums of above ten pounds."

1911

NEWMAN v. OUGHTON.

accordance with the Pawnbrokers Act, 1872, and is, therefore, as regards that transaction deprived of the protection of s. 6 (*a*); and, being a person whose business is that of money-lending, the transaction is void unless the pawnbroker is a registered money-lender. [*Litchfield* v. *Dreyfus* (1) and *Kirkwood* v. *Gadd* (2) were referred to.]

Francis Watt, for the claimants. Although a pawnbroker is a person who lends money in the course of his business, he is not a money-lender within the Act of 1900 in respect of pawnbroking transactions carried out in accordance with the Pawnbrokers Act, 1872; and the carrying on of an ordinary pawnbroker's business, therefore, cannot be relied on as evidence that he is carrying on a money-lending business. In the present case only one isolated transaction outside the pawnbroking business was proved, and that is not sufficient to prove that the claimants were money-lenders as defined by the Act.

Dodd, replied.

RIDLEY J. The claimants are pawnbrokers, and it was proved in the interpleader proceedings that they had advanced 50*l.* to the defendant on the security of a bill of sale, and that that was an isolated transaction. The question is whether the fact that the claimants are not registered money-lenders renders that transaction void. That depends on the definition of "money-lender" contained in s. 6 (*a*) of the Money-lenders Act, 1900. [The learned judge read the section.] It was said by Farwell J. in *Litchfield* v. *Dreyfus* (1) that "The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship"; and I think that Lord Loreburn L.C., when discussing in *Kirkwood* v. *Gadd* (2) the meaning of carrying on business, intended to adopt the language of Farwell J. which I have read, although it is true that the question in *Kirkwood* v. *Gadd* (2) was a different one, namely, as to where the appellant was carrying on his business. Turning again to s. 6 (*a*) of the Act, I think the meaning of it is that the business of pawnbroking is not included

(1) [1906] 1 K. B. 584. (2) [1910] A. C. 422.

in the business of money-lending, the intention being that a pawnbroker who carries on his business in accordance with the Pawnbrokers Act need not be registered as a money-lender; if, however, a pawnbroker carries on his business of pawnbroking in such a way as to violate the provisions of the Pawnbrokers Act, then he does not come within the protection of s. 6 (*a*). But I do not think that the exception in paragraph (*a*) of s. 6 is confined to pawnbroking transactions which are for sums of 10*l.* or less. I think all pawnbroking transactions are intended to be excepted, except those which are in violation of the Pawnbrokers Act, and that Act is not violated if more than 10*l.* is advanced on a pledge.

I have thought it right to express my opinion as to the meaning of s. 6 (*a*) of the Money-lenders Act; but whether I am right or wrong as to that, the evidence here is that the claimants have only carried out one money-lending transaction, apart from their pawnbroking business, and therefore, according to the definition of money-lender given in the case to which I have referred, it cannot be said that the claimants have been proved to be persons whose business is that of money-lending within the meaning of the Money-lenders Act; and it follows, therefore, that that transaction is not invalidated by reason of the claimants not being registered money-lenders.

AVORY J. I am of the same opinion. For the purpose of our decision we must assume from the evidence before us that this advance on the security of the bill of sale was an isolated transaction on the part of the claimants. It is contended that as the claimants are pawnbrokers the fact that they entered into that isolated transaction makes them money-lenders as defined by the Act of 1900. I agree that prima facie a pawnbroker is a money-lender because his business is that of lending money, but the Legislature, probably foreseeing that the definition of "money-lender" in s. 6 would include a pawnbroker, went on to enact in paragraph (*a*) that the expression "money-lender" shall not include any pawnbroker in respect of business carried on by him in accordance with the Pawnbrokers Act. I think the meaning of that is that a pawnbroker does not become a

1911

NEWMAN v. OUGHTON.

Avory J.

money-lender within the Act merely because he carries on the business of pawnbroking. If that is so, it is arguing in a circle to say that a pawnbroker, who is ipso facto not a money-lender, becomes a money-lender within the Act if he lends money apart from pawnbroking, on one occasion only, because his ordinary business involves the lending of money. I think the Legislature obviously intended to exclude a pawnbroker from the provisions of the Money-lenders Act so long as he was merely carrying on the business of a pawnbroker in accordance with the Pawnbrokers Act. In my opinion the fact that the claimants are pawnbrokers cannot be relied on as evidence that they are carrying on the business of money-lending within the Money-lenders Act, and, therefore, we are relegated to the question which arises in every case of a loan, whether the lender is a pawnbroker or not, namely, what evidence is there that he is a person whose business is that of money-lending. The only evidence in this case is this one isolated transaction of an advance of 50*l.* on the security of a bill of sale. That is clearly not enough to bring the claimants within the definition of "money-lender" in the Act. If we were to hold otherwise, we should be deciding that a pawnbroker who on one occasion lends 5*l.* to his brother brings himself within the provisions of the Money-lenders Act and thereby renders himself liable to a penalty for carrying on the business of a money-lender without being registered. I am clearly of opinion that that was never contemplated by the Legislature. Our decision on the question submitted to us is, therefore, that the claimants are not money-lenders within the Act.

Case remitted to the Master.

Solicitor for plaintiff: *W. Wilding Jones.*
Solicitor for claimants: *A. Wintle.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1911
Feb. 20, 21.

IN THE MATTER OF AN ARBITRATION BETWEEN KEDWELL AND FLINT & CO. AND OTHERS.

Landlord and Tenant—Compensation for Improvements—Market Garden—"Contract of tenancy current at the commencement of the Act"—Tenancy from Year to Year—Market Gardeners' Compensation Act, 1895 (58 & 59 *Vict. c.* 27), *ss.* 1, 3, 4—*Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 61—*Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *s.* 42, *sub-s.* 2.

By virtue of s. 61 of the Agricultural Holdings (England) Act, 1883, of which Act the Market Gardeners' Compensation Act, 1895, is to be read as part, a tenancy from year to year under a contract of tenancy current at the commencement of the last-mentioned Act must for the purposes of that Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of the Act until the first day on which it could be determined by notice to quit given immediately after the commencement of the Act, and thereafter be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Act. (1)

APPEAL from the judgment of the judge of the Kent County Court holden at Canterbury upon a special case stated by an arbitrator under the Agricultural Holdings Act, 1908, s. 13.

The appellant made a claim, as having been tenant of certain premises, against the respondents, Flint & Co., Pidduck, and Hart, who were the landlords, respectively, of the different portions of the said premises, for compensation under the Agricultural Holdings Act, 1908, which claim was referred to an arbitrator. The arbitrator stated a special case for the opinion of the county court as follows.

1. For many years prior to January 1, 1896, the premises in question, which are situate in Northgate Street, Canterbury, and which belong to the three landlords above mentioned, were occupied by a Mr. Court as tenant from year to year, and were

(1) The Agricultural Holdings (England) Act, 1883, and the Market Gardeners' Compensation Act, 1895, were repealed by the Agricultural Holdings Act, 1908, s. 49, but the construction of the above-mentioned sections of the repealed Acts became material by reason of the proviso to s. 42, sub-s. 2, of the Agricultural Holdings Act, 1908.

C. A. 1911

KEDWELL AND FLINT & CO., *In re.*

used by him, with the knowledge of the landlords, as a market garden. Mr. Court, both before and after January 1, 1896, executed thereon, without having received previously any written notice of dissent by the landlords, certain improvements in respect of which a right of compensation is given by the Act.

2. On or about October 11, 1901, Mr. Court assigned his interest in the premises to Messrs. Goldney, Evans, and Kedwell, who paid him a sum down for his valuation. On May 8, 1903, Mr. Kedwell entered into a tenancy agreement with Mrs. Pidduck as to her portion of the premises, the terms of which are not material to the question of law now submitted for the opinion of the Court; and in or about the year 1907 Mr. Kedwell bought the interest of Messrs. Goldney and Evans, and became the sole tenant of the premises.

3. The said Mr. Kedwell died on May 31, 1908; and his widow, the tenant in the above arbitration, entered into possession of the premises, and in October of the same year entered into agreements with Messrs. Flint & Co. and with Mrs. Pidduck, the terms of which are not material to the question of law now submitted for the opinion of the Court. No agreement was entered into with Mr. Hart.

4. In the year 1909 Mrs. Kedwell found herself unable to continue tenant of the premises, and gave to the three landlords above mentioned notice determining her tenancy on October 11, 1909. Possession was duly given on that day; all rents were paid, and the premises were left in good order.

5. Mrs. Kedwell submitted a claim for valuation under the Agricultural Holdings Act, 1908, and this claim is the subject of the arbitration.

6. The amount of the award depends upon the correct construction of the statutes applicable to the case, and particularly on the correct interpretation of the point of law now submitted for the opinion of the Court, a point which, it is believed, has not yet received judicial interpretation.

The material sections of the various Acts seem to be as follows:—

The Agricultural Holdings Act, 1908, s. 42, sub-s. 2: "Where under a contract of tenancy current on the first day of January,

1896, a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the Third Schedule to this Act, the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden, so however that the improvements in respect of which compensation is payable under those provisions as so applied shall include improvements executed before as well as improvements executed after that date. Provided that where such a tenancy was a tenancy from year to year, the compensation payable in respect of an improvement comprised in the Third Schedule to this Act shall be such (if any) as could have been claimed if this Act had not been passed."

In consequence of the last proviso it becomes necessary to consider the statutes which would have been applicable to a holding of this nature, if the Agricultural Holdings Act, 1908, had not been passed. These seem to be the Agricultural Holdings (England) Act, 1883, the Market Gardeners' Compensation Act, 1895, and the Agricultural Holdings Act, 1906. The latter Act, however, is not material to the question now submitted for the opinion of the Court.

The Agricultural Holdings (England) Act, 1883, s. 61, provides that: "A tenancy from year to year under a contract of tenancy current at the commencement of the Act shall for the purposes of this Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of this Act until the first day on which either the landlord or tenant of such tenancy could, the one by giving notice to the other immediately after the commencement of this Act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this Act. . . . . 'Tenant' includes the executors, administrators, assigns, legatee, devisee, or next of kin, husband . . . . of a tenant, or any person deriving title from a tenant."

C. A. 1911

KEDWELL AND FLINT & Co., *In re.*

By the Market Gardeners' Compensation Act, 1895, s. 1, "This Act . . . . shall be read and construed as part of the Agricultural Holdings (England) Act, 1883, hereinafter called the principal Act."

Sect. 4: "Where, under a contract of tenancy current at the commencement of this Act, a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

7. The tenant contends that, although the Market Gardeners' Compensation Act, 1895, is to be read and construed as part of the Agricultural Holdings (England) Act, 1883, it is not intended that every provision contained in the latter Act must be treated as applying to the Act of 1895, and that, on the true construction of the latter statute, the provisions in s. 61 of the Act of 1883 as to tenancies from year to year ought not to be read into s. 4 of the Act of 1895, as such a construction would tend to limit and restrict the scope and usefulness of that Act. She, consequently, contends that she is entitled, as to the portion of the holding belonging to Mr. Hart, to treat the tenancy current at the commencement of the Act of 1895 as continuing down to the date when she actually determined the tenancy, i.e., October 11, 1909, and as to the remainder of the holding, until such tenancy was determined by entering into new contracts of tenancy.

8. The landlords contend that the Market Gardeners' Compensation Act, 1895, must be read and construed as part of the Agricultural Holdings (England) Act, 1883, and that the provisions of s. 61 of the latter Act as to tenancies from year to year must be treated as applying (mutatis mutandis) to the Act of 1895, and that therefore Court's tenancy, which was a tenancy from year to year under a contract of tenancy current on the first day of January, 1896, continued to be such a tenancy until the

11th day of October, 1897, which was the first day on which such tenancy could have been determined by notice, and that on and after the 11th day of October, 1897, it must be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Market Gardeners' Compensation Act, 1895.

9. The question of law submitted for the opinion of the Court is:—Whether the provision in s. 61 of the Agricultural Holdings (England) Act, 1883, as to tenancies from year to year is to be read into s. 4 of the Market Gardeners' Compensation Act, 1895, so as to cause a tenancy from year to year under a contract of tenancy current on the first day of January, 1896, to be deemed for the purposes of the latter Act to continue to be a tenancy under a contract of tenancy current on the first day of January, 1896, until the first day on which either the landlord or the tenant could, the one by giving notice to the other immediately after the said first day of January, 1896, cause such tenancy to determine, and thereafter be deemed to be a tenancy under a contract of tenancy beginning after the first day of January, 1896.

The county court judge decided the above question in favour of the respondents, the landlords.

The tenant appealed from his decision.

E. M. Pollock, K.C., and *Cox-Sinclair*, for the appellant. Having regard to the proviso to s. 42, sub-s. 2, of the Agricultural Holdings Act, 1908, it is necessary to refer back to the Market Gardeners' Compensation Act, 1895, in order to determine the appellant's rights in respect of compensation. By reason of s. 1 of that Act, no doubt, for certain purposes, and so far as the two Acts can be construed so as to be consistent with one another, that Act is to be construed as part of the Agricultural Holdings (England) Act, 1883. But, as they stand, s. 61 of the last-mentioned Act cannot be construed so as to be consistent with s. 4 of the later Act, and they cannot be read together. The date of the commencement of the Act referred to in s. 61 is the first day of January, 1884, whereas the date of the commencement of the Act of 1895 is the first day of January, 1896. It is impossible

C. A.
1911
KEDWELL AND FLINT & Co., *In re*

to read the two sections together without introducing some term into s. 4 to the effect that, for the purpose of the application to it of the provisions of s. 61 of the earlier Act, "the commencement of the Act" in that section shall be read as meaning the first day of January, 1896. It is submitted that it is not competent for the Court to read in such a term. There is no reason for assuming that the Legislature did not intend s. 4 to take effect without any such limitation as would be introduced by the provisions of s. 61. If they had intended so to limit the effect of the section, they would certainly have made express provision for adapting the terms of s. 61 to the different date of the commencement of the later Act. It was open to a landlord, who desired to prevent the application of s. 4 of the Act of 1895 in futuro, to give a written notice of dissent under the section, and therefore there is really no injustice involved in giving full effect to s. 4 as it stands by itself, without introducing the limitation contained in s. 61 of the Act of 1883. [They cited *Smith* v. *Callander* (1); *Mears* v. *Callender*. (2)]

Foà, for the respondents, was not called upon to argue.

VAUGHAN WILLIAMS L.J. I can see no inconsistency between s. 4 of the Market Gardeners' Compensation Act, 1895, and any section whatever, whether s. 61 or any other section, of the Act of 1883, which would justify us in not reading the latter Act in its entirety as one with the Act of 1895. It seems to me that, under those circumstances, we have, in respect of a tenancy from year to year, to treat ss. 3 and 4 of the Market Gardeners' Compensation Act, 1895, as introduced into the provisions of the Act of 1883 by way of amendment or addition thereto. I have, therefore, no doubt that the provisions of the earlier Act as to the date at which tenancies from year to year under contracts of tenancy current at the commencement of the Act are to be deemed to determine have to be applied for the purposes of the Market Gardeners' Compensation Act, 1895. The particular section which we have to apply, and which must be treated as unrepealed by any amendment introduced by the Act of 1895, is s. 61. That section is in the following terms. [The Lord Justice here

(1) [1901] A. C. 297. (2) [1901] 2 Ch. 388.

read the section.] The object, as I pointed out during the argument, was to make provision with regard to tenancies from year to year, whereby, like other tenancies current at the commencement of the Act, they might have a definite termination. The effect of the legislation appears to me to be that a tenancy from year to year under a contract of tenancy current at the commencement of the Act is, for the purposes of s. 4 of the Act of 1895, to be deemed to continue to be a tenancy under a contract of tenancy so current for the period from that commencement down to the date when it could be determined by a notice given immediately after that commencement, and thenceforward is to be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Act. I think, therefore, that the answer to the question asked in the special case must be in the affirmative, and consequently this appeal must be dismissed.

FARWELL L.J. I am of the same opinion. Sect. 1 of the Market Gardeners' Compensation Act, 1895, provides that the Act shall be read and construed as part of the Agricultural Holdings (England) Act, 1883. The effect of such a provision is thus stated in the judgment of Lord Selborne in *Canada Southern Ry. Co.* v. *International Bridge Co.* (1): "It is to be observed that those two Acts are to be read together by the express provision of the 7th and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act." I can see nothing which makes it necessary in the present case to say that the provisions of s. 61 of the Agricultural Holdings (England) Act, 1883, have been modified by the Market Gardeners' Compensation Act, 1895. The last-mentioned Act does not proceed on a compulsory basis, but is limited by s. 3, which provides that "where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden, the following provisions shall have effect." The Act therefore primarily contemplates cases in

(1) (1883) 8 App. Cas. 723, at p. 727.

C. A. 1911

KEDWELL AND FLINT & CO., *In re.*

Farwell L.J.

which such agreements in writing are made in the future. Then we find in s. 4 a provision that, in cases of contracts of tenancy current at the commencement of the Act, where the conditions mentioned in that section are fulfilled, the provisions of the Act as to compensation are to be applied as if there had been an agreement in writing after the commencement of the Act that the premises should be let or treated as a market garden; but into that section has to be read the provision of s. 61 of the Act of 1883. It was decided by the House of Lords in *Smith* v. *Callander* (1) that the section of the Agricultural Holdings (Scotland) Act, 1883, corresponding to s. 4 of the English Act had not a retrospective application. The result of the legislation is, in my opinion, that, in the case of tenancies from year to year under contracts of tenancy current at the commencement of the Act, the provisions of s. 4 of the Act of 1895 will only apply during the period between the commencement of the Act and the date at which the tenancy could have been determined by notice given immediately after that commencement. The scheme of the Act of 1895 appears to be that its provisions as to compensation for improvements shall apply to tenancies in respect of which there is a written agreement after the commencement of the Act that the premises shall be let or treated as a market garden, with this addition, that, in the case of tenancies under contracts of tenancy current at the commencement of the Act, the provisions of the Act shall, if certain conditions are fulfilled, apply as if there had been such an agreement in writing after the commencement of the Act; but that, in the case of a tenancy from year to year under a contract of tenancy current at the commencement of the Act, that tenancy shall for the purposes of the Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of the Act only until the earliest date at which it could be determined by notice, and thereafter shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Act, with the result that, with respect to improvements made subsequently to that date, it will be subject to the same provisions as such a tenancy. It is not

(1) [1901] A. C. 297.

disputed that the provisions of s. 61 of the Act of 1883 other than that in question must apply to the Market Gardeners' Compensation Act, 1895, and I see no reason to exclude that provision. So construed the whole appears to be a perfectly rational and consistent mode of legislation. The general scope of the Act is that the question whether the holding is to be treated as a market garden or not is to be matter of agreement, but cases of tenancies from year to year under contracts of tenancy current at the date of the commencement of the Act are, subject to certain conditions, to be treated as if there was such an agreement as is contemplated by the Act up to the date when they might be determined by a notice given immediately after the commencement of the Act, and thenceforward the parties are left to make their own bargain.

KENNEDY L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Hare & Co., for Percy Maylam, Canterbury.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Henry Fielding, Canterbury.*

E. L.

K. B. D.
1910
Nov. 15.
C. A.
1911
Feb. 16, 17.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.

DEYES *v.* WOOD and Others.

Company — Debentures — Receiver — Appointment of Receiver by Debenture-holders—Remuneration, by whom payable—Receiver Agent of Debenture-holders—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-ss.* 1, 2, 3; *s.* 24, *sub-ss.* 2, 6.

By debentures issued by a company, its undertaking and all its property, both present and future, were charged with payment of the debenture debts, and, by a condition indorsed on and forming part of the debentures, it was provided that "at any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of the same issue, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment: and a receiver so appointed shall have power (1.) to take possession of, collect, and get in the property charged by the debentures, and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient, (2.) to carry on, or concur in carrying on, the business of the company, and for that purpose to raise money on the premises charged in priority to the debentures, (3.) to sell, or concur in selling, any of the property charged by the debentures after giving to the company at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company, (4.) to make any arrangement or compromise which he or they shall think expedient in the interests of the debenture-holders; and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction pari passu of the debentures; and the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections (1) of the said Act, which provisions so varied and extended shall be regarded as incorporated herein."

The principal moneys secured by the debentures having become payable, a receiver was appointed by holders of the majority in value of the outstanding debentures under the above-mentioned condition. In an action by the receiver against the debenture-holders by whom he

(1) *Sic.*

was appointed for remuneration in respect of services rendered by him as such receiver :—

Held, upon the terms of the before-mentioned condition in the debentures, that, in rendering those services, the receiver was acting as agent of the debenture-holders by whom he was appointed, and not of the company, and that he was therefore entitled to remuneration from the debenture-holders.

In re Vimbos, Limited, [1900] 1 Ch. 470, and *Robinson Printing Co.* v. *Chic, Limited*, [1905] 2 Ch. 123, followed.

ACTION tried before Scrutton J. without a jury.

The action was brought by the plaintiff against three defendants, named respectively Wood, Rigby, and Hilton, for remuneration in respect of services rendered to them, as holders of mortgage debentures in a company, by the plaintiff, as the receiver appointed by virtue of a power contained in the debentures as after mentioned.

The debentures provided for payment of the principal on December 31, 1914, or on such earlier day as it might become payable in accordance with the conditions indorsed thereon, and for payment of interest at the rate of 5 per cent. per annum, and that such payments should be charged on the company's undertaking and all its property present and future, including uncalled capital ; and stated that they were issued subject to and with the benefit of the conditions indorsed thereon, which were to be deemed part thereof. The material conditions were as follows :

" 17. The principal moneys hereby secured shall immediately become payable :—(*a*) if the company makes default for a period of four weeks in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company requires payment of such principal sum, or (*b*) if an order is made, or an effective resolution is passed, for the winding up of the company, or (*c*) if a distress or execution be levied, or enforced upon or against, any of the chattels of the company, or (*d*) if at any time it appears from the balance-sheet of the company that the liabilities of the company exceed the assets, including uncalled capital, or that the company is carrying on business at a loss, or that the further prosecution by the company of its business will endanger the security hereby constituted.

C. A. 1911

DEYES v. WOOD

"18. At any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of the same issue, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment: And a receiver so appointed shall have power: 1. To take possession of, collect, and get in the property charged by the debentures, and for that purpose to take any proceedings in the name of the company, or otherwise, as may seem expedient: 2. To carry on, or concur in carrying on, the business of the company, and for that purpose to raise money on the premises charged in priority to the debentures: 3. To sell, or concur in selling, any of the property charged by the debentures after giving to the company at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company: 4. To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture-holders: and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction pari passu of the debentures; and the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections (1) of the said Act, which provisions so varied and extended shall be regarded as incorporated herein."

The principal moneys secured by the debentures having become payable, the defendant Wood, purporting to act in pursuance of the power contained in the mortgage debenture and in the Conveyancing Act, 1881, and of every other power him thereunto enabling, appointed the plaintiff receiver of the mortgaged premises. The defendant Rigby assented in writing to this appointment. The defendant Hilton subsequently took a transfer from the defendant Wood of his debentures, but no

(1) Left blank.

point was raised by the defence as to his position being different as regards liability from that of the other two defendants.

W. F. Taylor, K.C., and *F. Cuthbert-Smith*, for the plaintiff.
Langdon, K.C., and *Stewart-Brown*, for the defendants.

1910. Nov. 15. SCRUTTON J. In this case the plaintiff, as receiver for debenture-holders in Peter Wood, Sproat & Co., Limited, claims from the three defendants, as holders of debentures in that company, remuneration as such receiver. The case was heard before me without a jury at Liverpool, and it was agreed that I should first decide the question of liability on the documents, the question of liability by conduct being reserved for further consideration, if necessary, and the question of amount of remuneration, if any, being referred to a tribunal selected by the parties.

The facts are simple, but the inferences from them give rise to questions of some difficulty.

The company issued sixteen debentures for 50*l.* each, of which the defendant Wood held eight and the defendant Rigby six. Each debenture charged the repayment of principal and the interest on the present and future property of the company. One of the conditions of the debenture, No. 18, was as follows. [The learned judge here read the condition.] In pursuance of this condition, the defendant Wood, purporting to act under the power contained in the mortgage debenture and in the Conveyancing Act, 1881, and every other power him thereunto enabling, appointed the plaintiff as receiver of the mortgaged premises comprised in the debenture, and the defendant Rigby consented in writing to such appointment. The defendant Hilton shortly afterwards took a transfer of the defendant Wood's debentures, but no point was raised before me as to any liability or defence on his part different from that of the other defendants. The plaintiff now sues the three defendants for reasonable remuneration as such receiver. It was argued by his counsel that they requested him to act; that he was on the true construction of the debenture, and on the authorities, their agent; and that they impliedly promised to pay him.

1910

DEYES v. WOOD.

Scrutton J.

The defendants' counsel in defence argued that, on the statutes and authorities, the plaintiff was the agent of the mortgagors, looking for his remuneration to a commission on the property received, and that his appointment by the defendants imposed on them no liability to pay him.

The authorities stand in this way. The law as to receivers appointed by trustees for debenture-holders is stated by Rigby L.J. in his dissenting judgment in *Gaskell* v. *Gosling*. (1) He points out that, owing to the almost penal liabilities of a mortgagee in possession, Chancery practitioners, with the assistance of Courts of Equity, elaborated a system by which a mortgagee, appointing a receiver, obtained the benefit of possession without its drawbacks. At first by agreement, and then by Lord Cranworth's Act (23 & 24 Vict. c. 145), and more fully by the Conveyancing Act, 1881, the mortgagee was given a power to appoint a receiver, with considerable powers of management, who yet should be the agent of the mortgagor, who alone was liable for his acts. In the case in question the receiver, who had very wide powers of management, as appears from the clauses of the debenture trust deed set out in the report (2) in the Court of Appeal, was held by the House of Lords (3) (who reversed the judgment of the Court of Appeal, and adopted the dissenting judgment of Rigby L.J.) not to be the agent of the trustees who appointed him so as to make them liable for his contracts. This was decided on the authority of *Cox* v. *Hickman* (4), and on the ground that the concurrence of creditors in an arrangement, by which their debtor carried on his business under a scheme by which the profits were applied to pay the creditors, did not make them partners, or persons by or on behalf of whom the business was carried on, so as to be liable for its debts. In this state of the law the case of *In re Vimbos, Limited* (5) came before Cozens-Hardy J. The receiver there was appointed by debenture-holders under a clause in a debenture substantially the same as the present one without the last sentence, and Cozens-Hardy J. expressed his opinion as follows: "It is remarkable that that power differs in

(1) [1896] 1 Q. B. 669, at pp. 691—693.
(2) [1896] 1 Q. B. 672, 673.
(3) [1897] A. C. 575.
(4) (1860) 8 H. L. C. 268.
(5) [1900] 1 Ch. 470.

almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver." It will be seen that the Conveyancing Act was not incorporated, either absolutely or subject to the conditions of the debenture, and that there was not any express provision that the receiver should be the agent of the mortgagor.

Next came the decision of Warrington J. in *Robinson Printing Co.* v. *Chic, Limited.* (1) There, again, the receiver was appointed by debenture-holders under a condition similar to that in the present case except that it did not include the last sentence of condition 18. Warrington J. expressed himself as follows: "There is no general rule of law which is of any assistance." He then cites a passage from Lord Cranworth's judgment in *Jefferys* v. *Dickson* (2), and continues: "The Lord Chancellor is there dealing with a receiver appointed under the ordinary power, that is to say, either by the mortgagor himself in pursuance of provisions in the mortgage deed, or by the mortgagee under similar provisions, or under the Act then subsisting, namely Lord Cranworth's Act. In all these cases there was an express provision that the receiver should be the agent of the mortgagor: see the remarks of Rigby L.J. in *Gaskell* v. *Gosling.* (3) This case, therefore, and, for similar reasons, *Owen & Co.* v. *Cronk* (4) and *Gosling* v. *Gaskell* (5), are of no assistance to me in deciding

(1) [1905] 2 Ch. 123.
(2) (1866) L. R. 1 Ch. 183, at p. 190.
(3) [1896] 1 Q. B. 669, at p. 692.
(4) [1895] 1 Q. B. 265.
(5) [1896] 1 Q. B. 669; [1897] A. C. 575.

1910

DEYES v. WOOD.

Scrutton J.

the question now before the Court. I now turn, therefore, to the construction of the debenture, and notice the following points. The receiver is appointed receiver of the property charged. His appointment is to be as effective as if all the debenture-holders had concurred. He is to have power not only to take possession of the property and to carry on the business, but he is to sell the property comprised in the debentures. He may make arrangements in the interests of the debenture-holders ; and, finally, any moneys in his hands are to be applied in satisfaction of the debentures. If he exercises his power to sell, it must be by virtue of and for the purpose of realizing the charge created by the debentures ; the business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture-holders, and in my opinion, having regard to all the points I have mentioned, he is their agent. I think he is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture." It will be observed that, of the points on which Cozens-Hardy J. laid stress in *In re Vimbos, Limited* (1), there was in the second case a direction as to what the receiver was to do with moneys he received, and there was a direction to keep down interest in the instruction to apply proceeds in the satisfaction of the debentures. There was no express incorporation of the Conveyancing Act, as there was in *Gaskell* v. *Gosling* (2), where the receiver was given the powers of the Conveyancing Act, and, without prejudice to those powers, certain special powers; nor was there any express provision that he should be the agent of the mortgagor only, nor that he should pay any surplus to the mortgagor. Left to myself, I should have had some doubt whether the principles laid down in *Gaskell* v. *Gosling* (2) led to the conclusions at which Cozens-Hardy J. and Warrington J. arrived, but I feel bound to follow, so far as they apply, these decisions, arrived at by judges of co-ordinate jurisdiction specially familiar with the subject-matter, and after consideration of the case of *Gaskell* v. *Gosling*. (2)

The debenture in the present case adds this feature. Though

(1) [1900] 1 Ch. 470. (2) [1896] 1 Q. B. 669; [1897] A. C. 575.

it does not contain any express provision that the receiver shall be the agent of the mortgagors, it does contain the following sentence: "And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections (1) of the said Act, which provisions so varied and extended shall be regarded as incorporated herein." By somebody's mistake the numbers of the sections intended to be incorporated have been omitted. I have no doubt that these sections at any rate include s. 24 of the Act, and I think it most probable that they cover the group of ss. 19 to 24. I have some doubt as to my powers to fill in the blank, but I propose to deal with the case on the assumption that at any rate s. 24 should be incorporated, as varied and extended by the express provisions of condition 18 of the debenture. On this view it is argued for the defendants that, as I then get in this debenture, by means of the 2nd sub-section of s. 24, an express provision that the receiver shall be the agent of the mortgagors, and in the final words of s. 24 an express provision that he shall pay the surplus to the mortgagors, there are supplied two out of the four features enumerated by Cozens-Hardy J., which were also absent from the debenture considered by Warrington J., and, therefore, I must go back to the general principles laid down in *Gaskell* v. *Gosling*. (2) For the reasons which I am about to state, and treating myself as bound by the two later decisions, the reasoning in which I adopt, I am unable to accept this argument.

Firstly the debenture omits to express the well-known provision that the receiver shall be the agent of the mortgagor; and, if it be suggested that it includes it by incorporating s. 24, sub-s. 2, of the Conveyancing Act, 1881, that sub-section only applies "unless the mortgage deed otherwise provides." Now in this case the mortgage deed contains all the provisions which Warrington J. in *Robinson Printing Co.* v. *Chic, Limited* (3) held sufficient to make the receiver the agent of the mortgagee. I am not able, therefore, to supply the absence of the express clause by the incorporating provision, particularly as the incorporation is only of the section as varied by the special provisions of the debenture.

(1) *Sic.* (2) [1896] 1 Q. B. 669; [1897] A. C. 575.
(3) [1905] 2 Ch. 123.

1910

DEYES v. WOOD.

Scrutton J.

Secondly, the express provision of the debenture requires the receiver to apply the proceeds to satisfy the debentures, that is the principal and interest; and I doubt whether his obligation is to pay the surplus, if any, to the mortgagors. If it is to pay it to the mortgagees, no doubt the mortgagees must account for it to the mortgagors, but that is quite consistent with the receiver being the agent of the mortgagees. Thirdly, the whole scheme of ss. 19 and 24 of the Conveyancing Act as to receivers is that they are receivers of income only, paying interest out of that, and accounting for the balance to the mortgagor. The scheme of this debenture is that the receiver is receiver of the whole assets, not of their income only, for the purpose of paying principal as well as interest out of them. This seems to me to place the mortgagees who appoint the receiver in a position of greater control and responsibility, rendering it far more just that the receiver appointed by them should be treated as their agent.

It was further argued for the defendants that, as by sub-s. 8 of s. 24 the receiver was to be paid by commission, and by sub-s. 6 this commission was 5 per cent. on the gross receipts, the receiver's right was limited to receiving that remuneration out of the gross receipts, and he had no personal remedy over. I do not think, however, that the right to remuneration is so limited; the receiver may spend the receipts in carrying on the trade, and in that case he may, in my opinion, look for remuneration to the implied promise to pay of those who request him to act. Further, I have considerable doubt whether the scale of remuneration of a receiver of income only, who pays interest only out of it, applies at all to a receiver of capital, who pays principal out of it.

In the result, therefore, I decide that the plaintiff is entitled on the documents to recover reasonable remuneration from the defendants as debenture-holders appointing him. I understand that in view of this decision it is not desired to argue the question of their liability by subsequent conduct, which is open to the plaintiff, if an appeal against my decision succeeds.

Judgment for plaintiff.

The defendants appealed.

1911. Feb. 16, 17. *A. Grant, K.C.*, and *Stewart-Brown*, (*Langdon, K.C.*, with them), for the defendants. The debenture in this case is a mortgage within the definition given by s. 2 (vi.) of the Conveyancing Act, 1881. By s. 19, sub-s. 1, of that Act a mortgagee, where the mortgage is made by deed, is to have the powers given by the section to the like extent as if they had been in terms conferred by the deed, namely, among others, (i.) a power of sale, when the mortgage money has become due, as specified in the sub-section, and (iii.) a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof. By sub-s. 2 of the same section "the provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act." By sub-s. 3, "This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained." The true construction of the debenture in this case is that it does not "express a contrary intention" within the meaning of sub-s. 3. The reference in condition 18 to certain provisions of the Conveyancing Act, 1881, is merely for the purpose of varying or extending them, as provided for in sub-s. 2, and cannot be construed as excluding the other provisions of the Act; and the provisions of the Act as so varied or extended are to "operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act." Then by s. 24, sub-s. 2, "the receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." Therefore the provisions of condition 18, by which the powers of the receiver are extended beyond those of a receiver under the Act, operate subject to the incident that the receiver appointed thereunder is to be deemed to be agent for the mortgagors.

C. A. 1911

DEYES v. WOOD.

This case is therefore distinguishable on this ground from *In re Vimbos, Limited* (1) and *Robinson Printing Co.* v. *Chic, Limited* (2), where the Conveyancing Act, 1881, did not apply; and the principle laid down in *Gosling* v. *Gaskell* (3) is applicable. The general understanding and practice in relation to the appointment of receivers in such cases are that they are to look to the estate for their remuneration, and not to the individual debenture-holders who appoint them. Unless the provisions of the Conveyancing Act, 1881, are expressly excluded by the provisions of the debenture, they must apply. On the true construction of condition 18 they are not excluded. The practice is to exclude them in express terms when it is intended that they should be excluded.

[FARWELL L.J. This is not like an ordinary receivership deed which provides for the payment of any surplus beyond what is necessary to satisfy what is due to the mortgagee to those who may be entitled to it; the proceeds of any assets are apparently payable under it to the debenture-holders only. The provisions of the Conveyancing Act, 1881, as to a receiver appear to contemplate the continuance of the security, but the provisions in this debenture treat the security as being one in the course of realization.]

That may be so, but the Act itself contemplates an extension of its provisions. [They also cited *Jefferys* v. *Dickson.* (4)]

P. Ogden Lawrence, K.C., and *F. M. Preston*, for the plaintiff. Apart from the question as to whose agent the receiver must be deemed to be for particular purposes, where services are rendered at the request of any one, the law generally implies, and the ordinary business understanding would be, that remuneration is to be payable to the person rendering the services by the person who requested him to render them. The question whether the receiver would be the agent of the mortgagees for the purpose of pledging their credit, which was referred to by Lord Davey in *Gosling* v. *Gaskell* (5), is not the right test for the present purpose. It does not follow that, because a receiver is to be

(1) [1900] 1 Ch. 470.
(2) [1905] 2 Ch. 123.
(3) [1897] A. C. 575.
(4) L. R. 1 Ch. 183.
(5) [1897] A. C. 575, at p. 595.

considered as the agent of the mortgagor, and not of the mortgagee, the ordinary implication that the receiver is to be paid by those appointing him is necessarily rebutted. It may be that he looks for his remuneration to the assets, if they are sufficient, but, if they are not, there is no reason why the ordinary implication should not arise: see *Ex parte Ford* (1); *In re Allison, Johnson & Foster, Ld.* (2)

Upon its true construction, however, the debenture in this case does not incorporate the provisions of s. 24, sub-s. 2, of the Conveyancing Act, 1881, and the receiver is the agent not of the mortgagors, but of the mortgagees. This is not a case of a receiver appointed under that Act, or analogous thereto. The powers given by the debenture in this case to the receiver, and the purposes for which he is to be appointed, go far beyond, and are quite different from, those contemplated by that Act. The provisions of that Act with regard to the appointment of a receiver contemplate only a receiver of income, whereas here the receiver is appointed for the purpose of receiving capital and realizing the security. He is intended to take possession of the property, and to have the powers of a manager, and he may carry on the business of the company so far as may be necessary for realizing the security. In these respects the case comes exactly within the reasoning of Cozens-Hardy J. in *In re Vimbos, Limited* (3) and Warrington J. in *Robinson Printing Co.* v. *Chic, Limited.* (4) Where it is intended that, in such a case, the provisions of s. 24, sub-s. 2, of the Conveyancing Act, 1881, should apply, and the receiver should be deemed to be the agent of the mortgagor, the proper course would be to incorporate those provisions in express terms. This debenture cannot be treated as incorporating the provisions of the Conveyancing Act, 1881, except so far as they may be expressly incorporated by condition 18. The provision of s. 24, sub-s. 6, with regard to the remuneration of the receiver by a 5 per cent. commission on income received would not be applicable to capital received. By s. 19, sub-s. 3, the provisions of the section are to apply only "if and so far as a contrary intention is not expressed in the

(1) (1885) 16 Q. B. D. 305, at p. 307.
(2) [1904] 2 K. B. 327.
(3) [1900] 1 Ch. 470.
(4) [1905] 2 Ch. 123.

C. A. 1911

DEYES v. WOOD.

mortgage deed"; and the provision of s. 24, sub-s. 2, is only applicable "unless the mortgage deed otherwise provides." It is not essential that the contrary intention or the provision otherwise should be expressed in direct terms, if it sufficiently appears from the general terms of the mortgage deed that the provisions in question could not have been intended to apply. The express reference in condition 18 to certain of the provisions of the Conveyancing Act, 1881, taken together with the other provisions of the condition, sufficiently rebut the idea that the other provisions of the Act were intended to be incorporated. In *Blaker* v. *Herts and Essex Waterworks Co.* (1) Kay J. said that he did not agree that the Conveyancing Act applies to a charge of this kind.

[FARWELL L.J. There the question was whether there was a power of sale under s. 19 of the Conveyancing Act, 1881, and the ground of the judgment was that, the undertaking being for a public purpose, such a power of sale could not be incorporated.]

Assuming it to be conceivable that a debenture might be so framed that for certain purposes a receiver might be agent for the mortgagor as under the Conveyancing Act, and for other purposes agent for the mortgagee, the contention is that upon the true construction of this debenture the receiver is not the agent of the mortgagors, at any rate for any purpose material to the present question. In the cases in which a receiver of this kind has been held to be the agent of the mortgagor, there was an express term that he should be deemed to be so. The Conveyancing Act, 1881, s. 24, sub-s. 2, only makes the receiver the agent of the mortgagor for the purposes of the exercise of the powers given by the provisions of that Act. If it were intended that the receiver should be deemed to be the agent of the mortgagors in the exercise of the far wider and wholly different powers given by this debenture, the proper course would have been expressly so to provide, and it cannot be inferred that such was the intention. The variations and extensions of the provisions of the Conveyancing Act contemplated by s. 19, sub-s. 2, are variations and extensions in relation to matters of the kind provided for by the Act; the

(1) (1889) 41 Ch. D. 399, at pp. 405, 406.

sub-section does not contemplate the extension of provisions of the Act by making them applicable to subject-matters wholly different from those dealt with by the Act. [They also cited *Owen & Co.* v. *Cronk* (1); *In re Henry Pound, Son, & Hutchins.* (2)]

A. Grant, K.C., for the defendants, in reply.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Scrutton J. was quite right. We have had read to us during the argument the passage in his judgment which begins thus: "Firstly the debenture omits to express the well-known provision that the receiver shall be the agent of the mortgagor; and, if it be suggested that it includes it by incorporating s. 24, sub-s. 2, of the Conveyancing Act, 1881, that sub-section only applies unless the mortgage deed otherwise provides." I need not refer to the rest of the passage, as it has been already read. It seems to me that the question with which we have here to deal, and on which our judgment must to a great extent depend, is that which is suggested at the beginning of that passage in the learned judge's judgment, namely, whether the receiver appointed in this case must be treated as the agent of the mortgagors or of the mortgagees. In dealing with that question, we are not unguided by recent decisions. In the case of *In re Vimbos, Limited* (3) Cozens-Hardy J. said, with regard to the power of appointing a receiver given in a debenture very similar to that in question here, "It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver

(1) [1895] 1 Q. B. 265. (2) (1889) 42 Ch. D. 402.
(3) [1900] 1 Ch. 470.

C. A. 1911

DEYES v. WOOD.

Vaughan Williams L.J.

in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver. If that be so, it seems quite plain that the liquidator has no right at all in these proceedings to get the remuneration of the agent, not of the company, but of the debenture-holders, assessed by the Court. The receiver does not come here asking for remuneration. He has got some money in his hands which the liquidator thinks is more than he is entitled to. The liquidator says the debenture-holders have been paid off, and that the receiver has money in his hands which he ought not to keep. I think, on that footing—namely that the receiver is agent for the mortgagees, and that this is the money of the mortgagees, and not of the company—this application must fail." In that case, therefore, the present Master of the Rolls arrived at the conclusion that, upon the true construction of the debenture, notwithstanding the provisions of the Conveyancing Act, 1881, ss. 19 and 24, the receiver was to be treated as the agent of the mortgagees, and not of the mortgagors. Another case cited to us was *Robinson Printing Co.* v. *Chic, Limited* (1), in which case Warrington J. came to, not quite the same conclusion, I think, as Cozens-Hardy J. arrived at in *In re Vimbos, Limited* (2), but to the conclusion that to a certain extent, though not entirely, the receiver in that case must be treated as the agent of the mortgagees. He said: "I now turn, therefore, to the construction of the debenture, and notice the following points. The receiver is appointed receiver of the property charged. His appointment is to be as effective as if all the debenture-holders had concurred. He is to have power not only to take possession of the property and to carry on the business, but he is to sell the property comprised in the debentures. He may make arrangements in the interests of the debenture-holders; and, finally, any moneys in his hands are to be applied in satisfaction of the debentures. If he exercises his power to sell, it must be by virtue of and for the purpose of realizing the charge created by the debentures: the business is

(1) [1905] 2 Ch. 123. (2) [1900] 1 Ch. 470.

carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture-holders, and in my opinion, having regard to all the points I have mentioned, he is their agent." So far the construction put by Warrington J. on the debentures in *Robinson Printing Co.* v. *Chic, Limited* (1) agreed with the construction put by Cozens-Hardy J. on the debentures in *In re Vimbos, Limited.* (2) They both arrived at the conclusion that the receiver in those cases respectively was to be treated as agent for the mortgagees, and for the same reasons. I need not refer to all the provisions of the debenture in *In re Vimbos, Limited* (2), but Warrington J. said that they were similar to those of the debenture in the case before him, and, upon the true construction of those debentures, both of the learned judges came to the conclusion that the receiver could not be considered as entirely the agent of the mortgagors. Cozens-Hardy J. appears to have been of opinion in the one case that the receiver was not the agent of the mortgagors for any purpose, while Warrington J. thought in the other case that the receiver was partly agent for the mortgagees, and partly agent for the mortgagors, for he went on to say, "I think he" (the receiver) "is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture." The reasons given by Warrington J. in the passage which I have cited from his judgment for the conclusion that the receiver was agent for the mortgagees seem to me very forcible and worthy of consideration.

When one looks at the provisions of the Conveyancing Act, 1881, with reference to the terms of the debenture in this case, one sees that they are directed to the appointment of a receiver, not for the purpose of taking possession, as a mortgagee taking possession used to do, or of realizing the security, but only for the purpose of the receipt and application of income in the manner provided for, formerly by Lord Cranworth's Act, and now more fully by the Conveyancing Act itself, whereas under the provisions of the debenture here the object of the appointment of the receiver is really the sale and realization of the security for the satisfaction of the debenture debts: and, indeed, when

(1) [1905] 2 Ch. 123. (2) [1900] 1 Ch. 470.

C. A. 1911

DEYES v. WOOD.

Vaughan Williams L.J.

one comes to look at the provisions of condition 18, one finds a great deal which goes to shew that it was intended here that the receiver should be a receiver on behalf of the mortgagees, and not on behalf of the company, the mortgagors. Upon reading the last clause of condition 18, which provides that "all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction pari passu of the debentures, and the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections (1) of the said Act, which provisions so varied and extended shall be regarded as incorporated herein," I will not say that its provisions constitute an entirely clear case of such an expression as to the inclusion of certain portions of the Conveyancing Act as must necessarily exclude any other portion of that Act; but it does appear to me that they do go a long way towards shewing that the receiver to be appointed was not intended to be in the position of a receiver appointed under the machinery provided by the Conveyancing Act in lieu of entry into possession by mortgagees, but was intended to be the agent of the mortgagees to take such possession as was necessary for the purpose of realizing the security, and distributing the proceeds amongst them. Under these circumstances I come to the conclusion that the effect of this debenture is to shew that the receiver appointed under it must be treated as the agent of the debenture-holders who appointed him, and therefore that the judgment of the learned judge should be affirmed.

FARWELL L.J. I am of the same opinion. In my view this is a mere question of the construction of the particular instrument. The language of condition 18 down to its last paragraph makes the debenture in this case, so far, practically undistinguishable from the debenture in *In re Vimbos, Limited* (2) and that in *Robinson Printing Co.* v. *Chic, Limited* (3), both of which cases

(1) Left blank. (2) [1900] 1 Ch. 470.
(3) [1905] 2 Ch. 123.

were in my opinion rightly decided. The result is that, down to that point, by necessary implication there is expressed in the condition an intention contrary to the applicability of s. 24, sub-s. 2, of the Conveyancing Act, 1881, by which the receiver is to be deemed to be the agent of the mortgagor, and, consequently, an intention that he should be the agent of the mortgagees. The last paragraph of the condition appears to me to clinch the matter. The provision of s. 24, sub-s. 2, of the Conveyancing Act, 1881, being that the receiver appointed by the mortgagee shall be deemed to be the agent of the mortgagor, and the implication from the preceding part of the condition being, as I have said, that the receiver is intended to be, not the agent of the mortgagors, but the agent of the mortgagees, the last paragraph of the condition provides that "the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions . . . . of the said Act, which provisions so varied and extended shall be regarded as incorporated herein." By this construction the whole condition is made consistent. With regard to the point made by the defendants' counsel upon s. 19, I am not sure that I quite followed it, but, if sub-s. 1 (iii.) of that section, which gives power to a mortgagee to appoint a receiver who is to be agent for the mortgagor, be excluded, then the subsequent sub-sections so far as incidental thereto have no application. For these reasons I think the appeal must be dismissed.

KENNEDY L.J. I agree, and desire to adopt what has been said by the other members of the Court. I will only add that, in my opinion, there is in this debenture a sufficient expression of intention to exclude the application of s. 19, sub-s. 1 (iii.), of the Conveyancing Act, 1881, which gives power to a mortgagee to appoint a receiver of income. The appointment of a receiver by virtue of such a power as is given in this case might, no doubt, incidentally involve the receipt of some income, but the Conveyancing Act, 1881, only enables the mortgagee to appoint a receiver in respect of income; and it appears to me that the adoption of s. 19, sub-s. 1 (iii.), is negatived, where there is the appointment of a receiver

C. A. 1911

DEYES v. WOOD.

expressly for the purpose of receiving capital and realizing the security.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Sons, for Collins, Robinson, Driffield & Kusel, Liverpool.*

Solicitors for defendants: *Field, Roscoe & Co., for Lowndes, Lloyd & Hilton, Liverpool.*

E. L.

1911 *Jan.* 11.

WHITEMAN *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

Money-lender—Carrying on Business in more than one Name—Trading alone and as Member of a Firm—Registration in respect of each Business—Liability to Penalty—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 2.

A money-lender who in fact carries on business in more than one name does not the less offend against s. 2, sub-s. 2, of the Money-lenders Act, 1900, because through a mistake of the registration authorities he has succeeded in getting himself registered in respect of both businesses.

CASE stated by an alderman of the city of London.

An information was laid by the Director of Public Prosecutions under s. 2 of the Money-lenders Act, 1900 (1), against the appellant charging that he between August 12, 1909, and October 19, 1909, being a money-lender, did unlawfully carry on business in more than one name, to wit, in the name of "Cobb & Co." at 43, Moorgate Street, and in the name of "Hill & Co." at 229, Seven Sisters Road.

(1) By the Money-lenders Act, 1900, s. 2, sub-s. 1, "A money-lender as defined by this Act . . . . (*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address."

Sub-s. 2: "If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address . . . . he shall be liable on conviction under the Summary Jurisdiction Acts to a fine."

The information was heard on January 31, 1910. At the hearing the following facts were proved :—

During the period alleged in the information, to wit, from August 12, 1909, to October 19, 1909, the appellant carried on business as a money-lender under the name of "Hill & Co." at 229, Seven Sisters Road, Finsbury Park, in the county of London.

During the said period the appellant in co-partnership with one Walter Elphick Whiteman carried on business as a money-lender in the name of "Cobb & Co." at 43, Moorgate Street, in the city of London.

Throughout the said period the appellant in respect of the said business of a money-lender carried on by him as aforesaid under the style of "Hill & Co." was registered. The registration with reference to the business of Hill & Co. was by entry in the register under date December 31, 1908.

Throughout the said period the appellant and his partner Walter Elphick Whiteman were registered in respect of the business carried on by them at 43, Moorgate Street, the registration having been by entry in the register under date August 12, 1908.

The alderman convicted the appellant subject to a case for the opinion of the Court.

Spear, for the appellant. At the time when this case came before the alderman there were two conflicting decisions;—one by Bucknill J. in a case of *Stirling* v. *Silburn & Pyman* (1) to the effect that in such a case as the present, where a money-lender carried on two businesses, one as an individual and the other as a member of a firm, a promissory note given to him by way of security for a loan was void, notwithstanding that he was registered in respect of both businesses; and the other by Bray J. in a case of *Sadler* v. *Whiteman* (2), where the present appellant was defendant, and in which on precisely similar facts it was held that a money-lender who was registered in respect of both businesses committed no breach of the Money-lenders Act, 1900, in carrying them on simultaneously. The

(1) [1910] 1 K. B. 67. (2) [1910] 1 K. B. 868.

1911

WHITEMAN v. DIRECTOR OF PUBLIC PROSECUTIONS.

alderman followed the decision of Bucknill J. Since that date *Sadler* v. *Whiteman* was taken to the Court of Appeal (1), and the Court unanimously reversed the judgment of Bray J., holding that a money-lender is prohibited by the Act from carrying on business both as an individual and as a partner in a firm whether he is registered in respect of both businesses or not. That case was further appealed to the House of Lords (2), and the Lords unanimously affirmed the Court of Appeal on the question of the prohibition against the carrying on of the two businesses and the impropriety of the double registration, but they also held that the impropriety of the registration did not affect the validity of the contracts entered into by the money-lender in the course of those businesses, and on that ground alone they reversed the decision of the Court below. But if the improper registration has not the effect of avoiding the money-lender's contracts, neither can it have the effect of exposing him to a penalty. The Act strikes at a money-lender who being actually registered by the registration authorities contracts otherwise than in his registered name, and not at a money-lender who being so registered contracts in that name or in those names. According to the regulations made by the Inland Revenue Commissioners under the powers given by s. 3 of the Act (3), provision was made for the registration of a firm in the firm name, as a distinct legal person, and though that has now been held by the House of Lords to be wrong, it was not known to be so at any time during the period of trading referred to in the information, that is to say, down to October 19, 1909, for the judgment of Bucknill J. was not given till October 16, 1909, and presumably was not reported till after October 19. And that it was reasonable for the appellant to assume that the double registration was free from objection appears from the fact that Bray J. subsequently held it to be so, the individual money-lender trading alone and the firm comprising that individual being treated by the Commissioners as distinct legal persons. Lord Macnaghten, when the case of *Whiteman* v. *Sadler* was before the House of Lords, said (4): "It would be a strong thing to

(1) [1910] 1 K. B. 868.
(2) [1910] A. C. 514.
(3) See [1910] 1 K. B. at p. 873, n.
(4) [1910] A. C. at p. 521.

hold that a person whose name has been placed on the register by the officers of a public department, in conformity with regulations purporting to be issued under the authority of Parliament, becomes liable to fine and imprisonment, and the absolute loss of all his contracts, not for trading without registration but for trading in a registered name, registered, I admit, wrongly, but registered by the authorized exponents of the requirements of the Act and the statutory custodians of the register. If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided. But if he is registered by the Commissioners and registered improperly, the fault does not lie with him alone. The Commissioners are at least equally to blame. It was said that a money-lender registers himself; the Commissioners have to accept the entry proposed, if it is not in contravention of their published regulations. I do not think that is what the Act meant. The Commissioners have important duties cast upon them. In a great measure the execution of the Act is placed in their hands." And Lord Dunedin said (1): "It is said that because we hold the registration to have been an improper registration therefore it was no registration. I do not think so. I think registered name means de facto registered name, and that it would be contrary to all justice to penalize the appellants for what was really a mistake of the Inland Revenue." If that is right, then the words "in no other name" in sub-s. 1 (*b*) must mean "in no other than a de facto registered name." But the words "in more than one name" in sub-s. 2 were intended to refer to and to be co-extensive with the words "in no other name" in sub-s. 1 (*b*). In other words the prohibition in sub-s. 2 was against trading "in other than a de facto registered name" and nothing more. And here the appellant, however improperly, was de facto registered in both names. Therefore in trading in those two names he committed no offence against the Act.

Bruce Williamson, for the respondent, was not called upon.

(1) [1910] A. C. at p. 527.

1911

WHITEMAN v. DIRECTOR OF PUBLIC PROSECUTIONS.

LORD ALVERSTONE C.J. The appellant in this case was prosecuted for carrying on business as a money-lender "in more than one name" contrary to the provisions of s. 2, sub-s. 2, of the Money-lenders Act, 1900. He in fact carried on business as a money-lender at two different places. At the one place he carried on such business alone under the name of Hill & Co., at the other in partnership with his father under the name of Cobb & Co. And he was registered in the names in which those two businesses were respectively carried on. The question is whether those two registrations are an answer to the charge. Mr. Spear's contention is that the words "in more than one name" in sub-s. 2 must be read as having reference to and as covering the same ground as the provision in sub-s. 1 (*b*) which requires that the money-lender shall "carry on the money-lending business in his registered name, and in no other name," and consequently as meaning nothing more than that he shall not carry it on in an unregistered name. In my judgment the statute meant that he should not carry on business in more than one name even though such names were registered. If the words "in more than one name" were not meant to include registered names they were entirely superfluous, for the carrying on of business in more than one unregistered name was already covered by the immediately preceding words "otherwise than in his registered name." Apart from authority therefore I think it clear that the fact of the registration of both names afforded the appellant no protection. Then do the authorities help his contention? In my opinion they do not. The House of Lords in *Whiteman* v. *Sadler* (1) had before them the judgments of the Court of Appeal, and approved of them; and in the Court of Appeal Vaughan Williams L.J. said (2): "I think that the mischief which might arise from the construction which is sought to be put on the Act of Parliament is so great that I hesitate to hold, and must refuse to hold, that business might be carried on by one man at different places and under different registered names, he being a money-lender at one place in respect of the business belonging to him there individually, and a money-lender under another registered name in respect of a business partnership in some firm." It is true

(1) [1910] A. C. 514. (2) [1910] 1 K. B. 868, at p. 879.

that he was there dealing only with sub-s. 1 (*b*), but the language used shews inferentially the proper construction to be put on sub-s. 2. Then Fletcher Moulton L.J. said (1): "If, as in this case, a man carries on business by himself, he must not carry on business as a member of a partnership, because in the one case he would have to carry on business in one name, and in the other he would have to carry it on in another name. The Act says that he may not carry on business in two names, and that is one of the main reforms that the Act intended to bring about." That passage clearly refers to registered as well as unregistered names; it would have no meaning if it was understood as limited to unregistered names. And when that case came before the House of Lords, Lord Macnaghten said (2): "It seems to me that the Court of Appeal was perfectly right in holding that a man who, under different names, carries on one business as an individual, and another as a member of a partnership firm, does carry on business in more than one name." And Lord Dunedin said (3): "It seems to me clear that the object of the Act is to provide, first, for identification of persons carrying on business as money-lenders, and, secondly, to prevent one man carrying on various businesses under a series of aliases. If that is so, it follows clearly that registration of any person, whether as an individual or as a member of a firm, exhausts, so to speak, that person's capacity of registration; for if it were not so, and if he, being actually registered as an individual, were allowed again to register as member of a partnership, he would be truly carrying on the business of a money-lender under more names than one." But notwithstanding those passages in the judgments which I have read Mr. Spear contends that although the double registration may be improper the act of trading under two registered names does not, having regard to the regulations of the Commissioners of Inland Revenue, expose the person so trading to a penalty, and for that he relies on a passage in Lord Macnaghten's judgment where he says (4): "It would be a strong thing to hold that a person whose name has been placed on the register by the officers of a

(1) [1910] 1 K. B. at p. 884.
(2) [1910] A. C. at p. 520.
(3) Ibid. at p. 524.
(4) Ibid. at p. 521.

1911

WHITEMAN v. DIRECTOR OF PUBLIC PROSECUTIONS.

Lord Alverstone C.J.

public department, in conformity with regulations purporting to be issued under the authority of Parliament, becomes liable to fine and imprisonment, and the absolute loss of all his contracts, not for trading without registration but for trading in a registered name, registered, I admit, wrongly, but registered by the authorized exponents of the requirements of the Act and the statutory custodians of the register." What Lord Macnaghten there meant by the reference to fine and imprisonment is not clear. He can hardly have meant that the mere fact of a man having succeeded in getting the authorities to register him in two different names would exempt him from the penalties imposed by sub-s. 2 if he carried on business under both those names, for that would be directly opposed to other passages in his own judgment, and also to the judgments in the Court of Appeal with which he had expressed himself to be in agreement. Moreover, any reference to the penal consequences of sub-s. 2 was unnecessary to the decision of the case before him, the only matter with which he was concerned being whether the contracts were void. In my opinion the fact of the man having been registered improperly in two different names is no answer to a prosecution under sub-s. 2, which says in terms that if a man carries on business in more than one name he shall be liable to a penalty. I think that the appeal must be dismissed.

HAMILTON J. I am of the same opinion. Sect. 2, sub-s. 2, of the Money-lenders Act, 1900, provides that "If a money-lender . . . . carries on business otherwise than in his registered name or in more than one name . . . . he shall be liable on conviction under the Summary Jurisdiction Acts to a fine." Prima facie those words would cover the present case. It is true that the sub-section does not in terms say whether the prohibition is to apply if all the names in which the money-lender carries on business are registered; but to read the words "in more than one name" as meaning "in more than one unregistered name" would render them absolutely unnecessary, for the carrying on of business in more than one unregistered name is already covered by the prohibition against carrying on business "otherwise than in his registered name." The appellant's contention

is that if he carries on business in more than one name this is not exclusively his own act, but is partly due to the act of the Commissioners of Inland Revenue, who have issued regulations under the Act, which were complied with when the two names in which he was carrying on business were registered. It is said that he ought not to be liable to conviction for doing something which under the regulations of the Commissioners he had correctly done, and that the penal section in question must be read as not applying to such a case as the present. In support of that contention the passage already cited in Lord Macnaghten's judgment in *Whiteman* v. *Sadler* (1) was referred to. If the words "fine and imprisonment" had not been used there the present argument could hardly have been raised. In my opinion those words were used per incuriam. In any view they were obiter, for the only question which the House of Lords was there considering was whether the defendant's contracts were void. It was unnecessary to consider what would have been the position of the money-lender if he had been prosecuted under sub-s. 2 instead of having his contracts attacked under sub-s. 1. Apart from that obiter dictum there is nothing in the judgments of the House of Lords, and, as I read it, there is nothing in the Act itself, to suggest that the appellant had not committed the offence of carrying on business in more than one name.

AVORY J. I am of the same opinion. It appears to me that the argument of the appellant gives no effect whatever to the words in sub-s. 2 "in more than one name," which appear to me clearly to constitute a separate and distinct offence. The House of Lords have said with reference to these very money-lenders that the registration in the name of Cobb & Co. ought not to have been accepted by the authorities at Somerset House. The argument for the appellant must go to this extent, that if a money-lender can succeed in inducing the authorities to register him in more than one name he will thereby be protected from any of the consequences under sub-s. 2 so long as he carries on business in those registered names. In my opinion the words "in more than one name" mean in more than one registered

(1) [1910] A. C. at p. 521.

1911

WHITEMAN v. DIRECTOR OF PUBLIC PROSECUTIONS.

Avory J.

name, or in more than one unregistered name, or in one registered name coupled with one or more unregistered names; in other words that the sub-section means what it says. The object of the Act was to protect the borrower, and to prevent a person who has been dealing with a money-lender under the name of Hill & Co. from being deceived into thinking that when he goes to Cobb & Co. he is dealing with a different person. I am of opinion that the conviction was right.

Appeal dismissed.

Solicitor for appellant: *A. G. Lewis.*

Solicitor for respondent: *Director of Public Prosecutions.*

J. F. C.

1911

Feb. 14.

TURNER *v.* MIDLAND RAILWAY COMPANY.

Limitation of Action—Compensation under Lands Clauses Act—Award—Action on—When Statute begins to run.

The period within which an action may be brought to enforce an award of compensation made by an arbitrator under the Lands Clauses Act, 1845, is six years from the date of the award.

APPEAL from the Sheffield County Court.

In 1897 the plaintiff, Jessie Turner, bought certain freehold houses. By a special Act of Parliament passed in the year 1900 the defendants were authorized to close a certain highway near the plaintiff's houses and to substitute therefor a new road and bridge. By the works so authorized, which were completed in April, 1903, the plaintiff's houses were injuriously affected within the meaning of s. 68 of the Lands Clauses Act, 1845, but no claim for compensation was made by her until August, 1909, she being in ignorance of her right to such compensation. In September, 1908, she sold the houses. On August 19, 1909, she, having then for the first time become aware of her rights, made a claim against the defendants for compensation. The defendants refused to pay, and the matter went to arbitration. The arbitrator on January 12, 1910, awarded to the plaintiff the sum of 10*l.* 8*s.* as compensation,

and costs which were taxed at 79*l.* 18*s.* The action was brought in the county court to enforce that award. The defendants set up as a defence that the action was barred by the Statute of Limitations, 21 Jac. 1, c. 16. The judge held that the cause of action arose upon the presentation of the claim for compensation, and that the action was consequently brought in time. He accordingly gave judgment for the plaintiff. The defendants appealed.

Danckwerts, K.C., and *S. G. Turner* (*Courthope Munroe* with them), for the defendants. In the case of a claim for compensation under the Lands Clauses Act the time within which an action may be brought to enforce the payment of the amount awarded runs not from the presentation of the claim, nor from the date of the award, but from the execution of the works whereby the claimant's land was damaged. It is true that by reason of the statutory authority to execute the work the right of action for damages is taken away, but in every case in which the special Act incorporates s. 68 of the Lands Clauses Act a co-extensive claim for compensation is given by the statute. The one is substituted for the other. And just as, if the work had not been authorized by statute, the period of limitation would have run from the accrual of the cause of action for the tort, so where, as here, the work was authorized the period of limitation runs from the accrual of the ground of compensation.

[AVORY J. If this road had been stopped without statutory authority would the action for the tort have been barred? If the road is kept stopped up, is not the damage to the houses a continuing one?]

No. Where the cause of the damage is a single act done once for all, as distinguished from a series of acts, the cause of action arises at the date when that act is done. The cause of action here, therefore, would have been the stopping up of the road, and that is equally the title to compensation. If the statute in such a case as the present is not to run from the execution of the work, it will be in the power of the claimant, if he so pleases, to suspend the presentation of his claim for an indefinite time. For it is now

1911

TURNER v. MIDLAND RAILWAY.

well settled by a series of authorities that the amount of the compensation must be settled by the arbitrator before the question of liability can be litigated. That shews that it rests with the claimant to take the first step. He cannot by postponing the assessment of the amount extend the time within which the action to recover that amount can be brought. If he does not get it assessed in time to allow of the action being brought within the statutory period he will be barred. Then if the period of limitation is to be taken to run from the execution of the work, what is that period? Is it six years under the statute of James I., or twenty years under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42)? The action is not brought upon the award, for the award does nothing more than fix the amount. The right of action is given by the statute authorizing the work, and the amount when assessed becomes a statutory debt. The action is an action of debt upon the statute. But an action for a statutory debt is treated as an action of debt upon a specialty, and therefore falls within s. 3 of 3 & 4 Will. 4, c. 42, and not within the statute of James I. The period of limitation, therefore, is twenty years. The result is that this appeal must fail; but it is desired to have the decision put on the true ground.

Bramley, for the plaintiff, was not called upon.

RIDLEY J. Mr. Danckwerts has not convinced me that the Statute of Limitations applicable to this case is the 3 & 4 Will. 4, c. 42, under which the period of limitation would be twenty years instead of six. I think that we ought to hold the case to fall within the statute of James I. The effect of work being done under the authority of a statute is that any cause of action in respect of damage caused by the execution of the work is prevented from accruing, the work being made lawful. And even though the statute may incorporate s. 68 of the Lands Clauses Act, that will give no cause of action in respect of the damage. That section gives, not a cause of action for a wrong, but compensation for damage by a lawful act. At the date, therefore, of the execution of the work, and down to the time of the arbitrator's award, there is no cause of action at all to which the Statute of Limitations can apply. But on the making of the award a cause

of action, in my opinion, for the first time arises. The action is founded on the award and on the award alone, and it is from the date of the award that the statute runs.

AVORY J. I am of the same opinion. I agree that there was no cause of action till the award was made. The statute which empowered the defendants to do the work did not give rise to any cause of action. The defendants in doing the work did something which they were authorized to do. All that s. 68 gave was a right to compensation, which is a very different thing from a cause of action. But until the amount of that compensation was ascertained by the award no action could be brought. With regard to the period of limitation Mr. Danckwerts says that the period applicable is twenty years. With that I cannot agree.

Appeal dismissed.

Solicitors for defendants: *Beale & Co.*

Solicitors for plaintiff: *Ridsdale & Son, for Willis & Willis, Rotherham.*

J. F. C.

C. A.

1911

Feb. 15.

[IN THE COURT OF APPEAL.]

H. TOLPUTT & CO., LIMITED *v.* MOLE.

Solicitor—Registrar of County Court—Defendant in Person—Taxation—Costs as Solicitor—Registrar acting as Solicitor in his own Court—Taxation by Registrar of his own Bill of Costs—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 41, 43, 118—*County Court Rules*, 1903—1908, *Order* LIII., *r.* 25.

Sect. 41 of the County Courts Act, 1888, which provides that a registrar of a county court shall not be engaged as solicitor for any party in any proceeding in the registrar's court, does not prevent a registrar, who is a solicitor, from defending himself in person in an action brought against him in his own Court, or from recovering from the plaintiffs in the action such costs as a solicitor defendant is entitled to on taxation, under Order LIII., r. 25, of the County Court Rules, 1903—1908; and by reason of s. 118 of the Act, which provides that all costs shall be taxed by the registrar of the Court in which they were incurred, the registrar's bill of costs must, of necessity, be taxed by the registrar himself.

The defendant was the registrar of a county court and was also a practising solicitor. The plaintiffs brought an action against him in that Court, alleging negligence by him in his official capacity. The defendant acted as his own solicitor in the action and was represented by counsel at the trial. The county court judge gave judgment for the defendant with costs. The defendant brought in his bill of costs for taxation and gave notice of a taxation before himself. The plaintiffs' solicitor attended the taxation under protest, and, on the taxation, the defendant disallowed several items. The plaintiffs applied to the county court judge to review the taxation, and on the review the judge taxed off two further items:—

Held (affirming the decision of a Divisional Court, Phillimore and Avory JJ., ante, p. 87), that the taxation had to take place of necessity before the defendant himself; that the defendant appeared in person and did not lose his costs because he was also registrar and a solicitor; that the county court judge had not taxed on any wrong principle; and, further, that by their application to the county court judge the plaintiffs had waived their objection to the jurisdiction.

Appeal from judgment of a Divisional Court (Phillimore and Avory JJ.) reported ante, p. 87.

The defendant was the registrar and high bailiff of the Redhill County Court. He was also a practising solicitor. The plaintiffs brought an action against the defendant in that Court, alleging negligence by him in his capacity as registrar and high bailiff. The defendant acted as his own solicitor in the action

and was represented by counsel at the trial. The county court judge gave judgment for the defendant with costs on the higher scale, column B. The defendant thereupon brought in his bill of costs for taxation and gave notice of a taxation before himself. The plaintiffs' solicitor attended the taxation under protest.

The total amount of the bill was 20*l.* 8*s.*, of which 11*l.* 0*s.* 6*d.* represented payments to counsel and witnesses.

The bill contained the following, amongst other, items :—

	£	*s.*	*d.*
" Instructions to defend - - - -	0	6	8
" Perusing plaintiffs' notice to produce -	0	5	0
" Perusing plaintiffs' notice to admit - -	0	5	0
" Instructions for brief - - - -	1	11	6
" Subpœnas to witnesses (3) - - -	0	9	0
" Plaintiffs not having made required admissions as to documents, affidavit of service of notices, including engrossing, attending to be sworn, and filing - - - -	0	2	0
" Attending Court when judgment was given for defendant - - - - -	1	1	0
" Attending taxation - - - - -	0	6	8."

On the taxation the defendant disallowed the item of 6*s.* 8*d.* for instructions to defend and the item of 2*s.* for affidavit of service of notices; he taxed 6*s.* off the item of one guinea for attending Court and taxed 2*l.* 1*s.* 6*d.* off the costs charged in respect of payments to the witnesses. The bill as allowed amounted to 17*l.* 11*s.* 10*d.* The plaintiffs applied to the county court judge to review the taxation, and on the review the judge further taxed off the sum of 1*l.* 1*s.* 8*d.*, being 15*s.* the balance remaining of the guinea charged for attending Court and the item of 6*s.* 8*d.* charged by the defendant for attending the taxation. The plaintiffs appealed from the judge's decision on the review of the taxation.

The Divisional Court decided in favour of the defendant, and the plaintiffs appealed.

Barrington Ward and *Clarke Hall*, for the appellants. The defendant had no jurisdiction to tax his own bill of costs. This

C. A. 1911

H. TOLPUTT & CO., LIMITED v. MOLE.

was not a case of necessity; he might have appointed a deputy or asked the county court judge to undertake the taxation.

[BUCKLEY L.J. It is too late for you to take this objection. You did not ask the county court judge to say the taxation before the defendant was a nullity, but you asked him to review it.]

The appellants protested against the taxation.

[FLETCHER MOULTON L.J. You cannot apply to a Court under protest.]

The defendant had no right to act as solicitor in the Court of which he was registrar: County Courts Act, 1888, s. 41.

[BUCKLEY L.J. The defendant was appearing in person, not "engaged as solicitor."]

A solicitor registrar who appears in person has no right to charge profit costs.

[*Sir F. Low, K.C.*, for the defendant. The exact point is provided for by Order LIII., r. 25, of the County Court Rules, 1903—1908, which is founded on the decision in *London Scottish Benefit Society* v. *Chorley*. (1)]

A registrar solicitor who appears in person in his own Court cannot make such a charge. At most he is entitled to out of pocket expenses.

Sir F. Low, K.C., and *Morton Smith*, for the defendant, were not called upon to argue.

COZENS-HARDY M.R. This appeal must be dismissed with costs. The defendant Mole was sued for negligence. He is a solicitor and the registrar and high bailiff of the Redhill County Court, and the plaintiffs elected to sue him, although they were not bound to do so, in the Court of which he was registrar. He appeared in person; the case came on for trial before the judge of that county court, and a verdict was given for the defendant with costs. Under the County Court Rules, 1903—1908, it is said, and in my opinion rightly said, that the only person who could tax the defendant's costs was of necessity the defendant himself as registrar of the county court in which the case was tried. The defendant gave notice of taxation before himself. The plaintiffs appeared before him and went through the taxation

(1) (1884) 13 Q. B. D. 872.

C. A. 1911

H. TOLPUTT & Co., LIMITED v. MOLE.

Cozens-Hardy M.R.

before him, when he reduced his bill by several items. The plaintiffs applied to the county court judge to review the taxation; the judge went through the bill again and reduced it still further, leaving some 16*l.* due on the bill; and he gave the plaintiffs leave to appeal. The appeal came before a Divisional Court, and they held with perfect correctness that this taxation was conducted of necessity before the defendant himself as registrar of the county court, and had come before the judge himself properly under the rules; and, on the authority of *London Scottish Benefit Society* v. *Chorley* (1), that the defendant was entitled to the same costs as if he had employed a solicitor, except in respect to items which the fact of his acting directly rendered unnecessary; and that a defendant who was a solicitor appearing in person ought not to lose his costs because he was also registrar. Their attention was not called to the particular rule which expressly deals with this matter, County Court Rules, 1903—1908, Order LIII., r. 25, which provides that "Where a solicitor who is a plaintiff or defendant appears in person and is allowed costs he shall be entitled on taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary." That is no doubt derived from the decision in *London Scottish Benefit Society* v. *Chorley*. (1) On that principle the costs have been taxed here, and there is no possible reason for quarrelling with what has been done in this case. It was said that there was no jurisdiction in the registrar to tax these costs at all. That cannot be maintained after what has taken place in the county court and Divisional Court. This appeal fails both because we approve of the judgment of the Court below and because in our opinion it is not open to the plaintiffs to raise these objections to the jurisdiction.

FLETCHER MOULTON and BUCKLEY L.JJ. concurred.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co., for De Wet, Folkestone; H. Tyrrell & Son.*

(1) 13 Q. B. D. 872.

H. C. R.

C. A.
1911
Jan. 20.

[IN THE COURT OF APPEAL.]

UNITED MINING AND FINANCE CORPORATION, LIMITED *v.* BECHER.

Solicitor—Undertaking to pay Money to Person not Client—No Misconduct on Part of Solicitor, nor Legal Proceedings pending—Disciplinary Jurisdiction of Court—Summary Order for Payment.

Appeal by H. Percy Becher from judgment of Hamilton J., reported [1910] 2 K. B. 296.

Hohler, K.C., and *A. Houston*, for the appellant.
Gore-Browne, K.C., and *H. Hurrell*, for the respondents.

On the hearing of the appeal before the Court of Appeal, after the argument had proceeded for some time, it was arranged, with the sanction of the Court, that interpleader proceedings should be taken by the appellant Becher in respect of the sum of 2000*l.*, which had been paid into Court in pursuance of the order of Hamilton J. (1), and that the hearing of the appeal should in the meantime be adjourned. Such proceedings were accordingly taken by the appellant with the result that any claim to the money in question by Ivanitzky as against the appellant was barred, and, ultimately, the matter was disposed of by an order that the money paid into Court should be paid out to the respondents, subject to provisions as to certain costs, which it is not necessary to set out, without any decision by the Court upon the questions of law and practice which were dealt with by the judgment of Hamilton J. in the Court below.

Solicitor for appellant: *H. Percy Becher.*
Solicitors for respondents: *Christopher & Son.*

(1) See [1910] 2 K. B. at p. 308.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1911
Feb. 17.

In re A DEBTOR (No. 20 OF 1910).

Bankruptcy—Appeal—Practice—Order extending Time for appealing—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Appeals* (*County Courts*) *Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*a*).

Sect. 1, sub-s. 1 (*a*), of the Judicature (Procedure) Act, 1894, which provides that no appeal shall lie from an order allowing an extension of time for appealing from a judgment or order, applies to an order of a Divisional Court in bankruptcy extending the time for appealing from an order of the county court.

APPEAL from an order of a Divisional Court (Phillimore and Horridge JJ.) granting the debtor an extension of the time for appealing against a receiving order made by the registrar of the Halifax County Court.

The Divisional Court had refused leave to appeal from this order, but leave was subsequently granted by the Court of Appeal.

Alan Macpherson, for the respondent, the debtor, took a preliminary objection to the hearing of the appeal. Sect. 1, sub-s. 1 (*a*), of the Judicature (Procedure) Act, 1894, which says that no appeal shall lie from an order allowing an extension of time for appealing from a judgment or order, shews that it is not competent to the Court to entertain this appeal.

Hansell, for the appellants, the petitioning creditors. The Judicature (Procedure) Act, 1894, does not apply to bankruptcy appeals. The jurisdiction of the Court of Appeal in bankruptcy matters depends on s. 104 of the Bankruptcy Act, 1883, and in this particular instance on s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884, and the jurisdiction of the Divisional Court depends upon the latter provision. The Bankruptcy Act of 1883, as amended by the Act of 1884, and the Bankruptcy Rules provide a complete code for the regulation of appeals in bankruptcy. The Rules of the Supreme Court are not mentioned in the Bankruptcy Rules, except in r. 134, which says that the

C. A. 1911

A DEBTOR, *In re.*

Rules of the Supreme Court shall apply to appeals subject to the Bankruptcy Rules, and in r. 353, which says that, save as expressly provided by the Bankruptcy Rules, the Rules of the Supreme Court shall not apply to any proceeding in bankruptcy. The jurisdiction of the Court of Appeal in bankruptcy matters is derived, not from the Judicature Acts, but from the Bankruptcy Act, and the special provisions contained in that Act for this class of business exclude the power of the Court to apply this Judicature Act of 1894 to bankruptcy appeals. The Divisional Court when sitting to hear bankruptcy appeals is peculiarly constituted, for it must include the judge in bankruptcy for the time being, and, although it is no doubt part of the High Court, it is exercising its jurisdiction, not in that capacity, but as a specially constituted Court of Appeal under s. 2 of the Act of 1884. So also the initial jurisdiction of the High Court in bankruptcy is expressly conferred upon it by ss. 92 and 93 of the Bankruptcy Act, 1883. The Judicature Acts and Rules have no application to bankruptcy matters except so far as they are expressly incorporated by the Bankruptcy Rules.

COZENS-HARDY M.R. In my opinion this preliminary objection must prevail. This is a county court bankruptcy. An application was made to the Divisional Court to extend the time for presenting an appeal to that Court. That application was granted. Last week, on the application of Mr. Hansell for the petitioning creditors, we gave leave to appeal against that order extending the time, the Divisional Court having refused leave. The objection is now taken that under s. 1, sub-s. 1 (*a*), of the Judicature (Procedure) Act, 1894, it is not competent to this Court to entertain the appeal. The position is rather peculiar. In the case of London bankruptcies appeals come direct to this Court. In the case of country bankruptcies they go to a Divisional Court. That is provided by s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884, which repeals s. 104, sub-s. 2 (*a*), of the Bankruptcy Act, 1883, and enacts "that an appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a county court to a Divisional

Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall for the purpose of hearing any such appeal be a member. The decision of such Divisional Court upon any such appeal shall be final and conclusive, unless in any case it shall seem fit to the said Divisional Court or to the Court of Appeal to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

That being the state of things, this matter was, in my opinion, according to the plain language of this Act a matter in a Divisional Court of the High Court of Justice, and none the less so by reason that the Court so constituted has to have as one of its members the judge to whom bankruptcy business is ordinarily assigned. It was undoubtedly a proceeding in the High Court of Justice. From that order of the Divisional Court, which was an order extending the time for appealing, an appeal is presented here. Then we are met by the Act of 1894, which in s. 1, sub-s. 1, says in perfectly general terms, "No appeal shall lie—(*a*) from an order allowing an extension of time for appealing from a judgment or order." More general words cannot be imagined. We are asked to say that there is a self-contained code, or, as Mr. Hansell preferred to say, a special and peculiar code, applicable to bankruptcy proceedings which is to be found in the Bankruptcy Act and Rules, and that that ought not to be touched by a subsequent Act of Parliament dealing with procedure generally. In my opinion the language of the Act of 1894 is such that it absolutely precludes this Court from entertaining an appeal from any order in the High Court extending the time for appealing, whether the High Court is sitting as a Court of Appeal in bankruptcy or otherwise. The preliminary objection must, therefore, prevail, and this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I have no doubt that the tribunal which hears appeals from the county court in bankruptcy matters is sitting as a Divisional Court of the High Court of Justice. It may be that for the special purposes of that particular kind of work it has to be peculiarly constituted, but there is nothing in s. 2 of the Bankruptcy

C. A. 1911

A DEBTOR, *In re.*

Fletcher Moulton L J.

Appeals (County Courts) Act, 1884, which prevents it from being a Divisional Court of the High Court of Justice. Therefore appeals from that Court are in every sense appeals from a Divisional Court, and all such appeals are beyond controversy within the scope of, and bound by, the Act of 1894, which forbids appeals from an order extending the time for appealing.

BUCKLEY L.J. The order under appeal is one allowing an extension of time for appealing. By s. 104 of the Bankruptcy Act, 1883, that order was made appealable, because that Act says in so many words "an appeal shall lie" from every order. Subsequently in 1894 was passed the Judicature Act of that year, which provides that no appeal shall lie from an order allowing an extension of time for appealing from a judgment or order. In my opinion the Act of 1894 is a perfectly general statute. It contains no exception of orders made in bankruptcy. After that Act the right given by the Bankruptcy Act, 1883, is so cut down as that the particular order mentioned in the Act of 1894 is rendered unappealable.

Appeal dismissed.

Solicitors for respondent: *Robins & Co., for Longbotham & Sons, Halifax.*

Solicitors for appellants: *Ward, Bowie & Co., for Walter & E. H. Foster, Leeds.*

H. B. H.

BATT *v.* METROPOLITAN WATER BOARD.

1911
Feb. 14.

London—Waterworks—Communication Pipe—Stop-Cock Box—Liability of Householder to repair—Power to break up Street for that Purpose—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 19.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, it is provided that the Board shall at the request of the owner or occupier of any house in a street in which any service main of the Board is laid furnish to such owner or occupier "by means of a communication pipe . . . . and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost" a sufficient supply of water for domestic purposes at a rate not exceeding 5 per cent. of the rateable value of the house:—

Held, that the section in so far as it imposes an obligation upon the householder to repair the communication pipe is not retrospective, and does not apply to communication pipes in existence at the date of the passing of the Act.

Appeal from the Westminster County Court.

The plaintiff, Florence Batt, while walking along a certain highway called Amery Place, near the Old Kent Road, caught her foot in a stop-cock box which had been allowed to get out of repair, and in consequence of its defective condition she fell, thereby sustaining injury. The box in question was used in connection with a communication pipe through which water was supplied to a house, No. 17, Amery Place, by the defendants, and contained the spindle by which the supply of water to the house could be regulated. The box was situate in the pavement about one foot from the exterior of No. 17, Amery Place, and about ten feet from the defendants' main. It had been there for some years, but there was no evidence as to when it was put there or by whom. It had originally been fitted with a lid, which, however, had disappeared. The result of the absence of the lid was that an unprotected hole was left in the pavement measuring about four inches square by six inches deep. The defendants contended that the obligation to repair the stop-cock box did not rest upon them, for that, even if it had done so previously to 1907, it had by reason of s. 8 of the Metropolitan Water Board

1911

BATT v. METROPOLITAN WATER BOARD.

(Charges) Act, 1907 (1), been transferred to the owner or occupier of No. 17, Amery Place, for the purpose of the supply of water to which house alone the box was used. The county court judge held that the section was retrospective and applied to existing communication pipes as well as to pipes thereafter to be laid. He accordingly gave judgment for the defendants. (2) The plaintiff appealed.

Simner, for the plaintiff. Previously to the year 1907 the owner of a house which was supplied with water through a communication pipe was under no obligation to the public to keep that pipe or the stop-cock box connected with it in a state of repair even though the pipe or box was his property: *Chapman* v. *Fylde Waterworks Co.* (3) The obligation in that respect lay upon the water company from whose main the pipe led, and upon them alone, for they alone had the necessary power of breaking up the pavement. The house owner had power under s. 52 of the Waterworks Clauses Act, 1847, to break up the pavement for the purpose of laying a communication pipe or of removing it,

(1) By the Metropolitan Water Board (Charges) Act, 1907, s. 8, "Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply."

Sect. 19: "For the purpose of complying with any obligation under this Act to maintain any pipe or apparatus the person liable to maintain the same shall have the like power to open the ground as is conferred upon him by sections 48 to 52 of the Waterworks Clauses Act 1847 in relation to the laying of communication pipes."

(2) There was no finding by the county court judge whether the stop-cock box could have been fitted with a lid without breaking up the pavement.

(3) [1894] 2 Q. B. 599.

but not for the purpose of repairing it. And it must be presumed that a stop-cock box could not be repaired and fitted with a new lid without taking it out, which would involve breaking up the pavement. It was contended in the Court below that *Chapman's Case* (1) did not apply to apparatus situate in the metropolis, because by s. 28 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), it was provided that "Every owner or occupier of premises upon whom notice to that effect has been served shall within two months after the date of the service of such notice provide the prescribed fittings and shall from time to time keep the same in proper repair," and reliance was placed upon the case of *Grand Junction Waterworks Co.* v. *Rodocanachi* (2), where it was held that, there being a defect in the communication pipe leading to the respondent's house whereby a serious waste of water was caused, the company were entitled to call upon the respondent under that section to repair it, and upon his failure to do so to cut off the water. But there the company before calling upon the respondent to repair had themselves opened the ground down to the pipe, so that the question of the respondent having power to break open the pavement did not arise. That case does not in any way suggest that *Chapman's Case* (1) does not apply to the metropolis. Moreover in the present case there was no evidence as to the date when the box was placed in the ground. It may have been there before 1871, in which event s. 28 would not apply.

Then does s. 8 of the Metropolitan Water Board (Charges) Act, 1907, transfer the obligation to repair the box from the Board to the house owner? It is contended that that section is prospective only and applies only to pipes to be laid in the future, not to existing pipes. The section begins with the provision that the Board shall "at the request of the owner or occupier . . . . or of any person who . . . . shall be entitled to require a supply" furnish a supply of water. That can only refer to houses not already supplied at the date of the passing of the Act. Then it provides that the supply shall be through communication pipes "to be provided and laid down and maintained by him." The supply contemplated is through pipes to

(1) [1894] 2 Q. B. 599. (2) [1904] 2 K. B. 230.

1911

BATT v. METROPOLITAN WATER BOARD.

be laid down in the future, and it is only such pipes that the house owner is required to maintain. Apart, therefore, from other considerations the natural meaning of the language points to this obligation of maintenance being confined to pipes laid after 1907. But even if there were any doubt about the proper construction the Court ought to lean strongly against the contention that the section is retrospective. In the absence of clear words the presumption is against an intention to take away from the public their remedy against a substantial body like the Water Board and give them instead a right of action against a possibly impecunious householder. Moreover this is a private Act, and private Acts do not bind the public. The title of the Act is "An Act to provide for uniform scales of charges for water applicable throughout the limits of supply of the Metropolitan Water Board and for other purposes." The preamble does not even refer to the wide transfer of liability which the Board suggest. The necessary inference is that it was not intended to alter the incidence of the burden of repair in the case of existing pipes.

Ross Brown (*C. A. Russell, K.C.*, with him), for the defendants. In the first place, even apart from the question arising under the Act of 1907 the Board are not liable, for the principle of *Chapman* v. *Fylde Waterworks Co.* (1) only applies where the apparatus cannot be repaired without breaking up the street. In that case there was an express finding that it could not be so repaired. There is no such finding here. And, as the onus lies upon the plaintiff, in the absence of such a finding he must fail. Secondly, s. 8 of the Act of 1907 is retrospective. The suggestion on the other side that the whole of that section is prospective only involves a conclusion so manifestly contrary to the expressed intention of the Legislature that the Court will, if necessary, strain the language to avoid it. If no part of that section applies to pipes existing before 1907, the Board will have no power to charge any water rates at all except to houses supplied with water for the first time after that date. For by s. 6 the whole of the charging clauses in the special Acts of the companies whose undertakings were taken over by the Board are repealed, and the

(1) [1894] 2 Q. B. 599.

only charging clause enacted in their place is s. 8. But it may be said that it is unnecessary for the plaintiff's argument to go so far, and that it might be contended that while the last three lines of s. 8 are of general application, applying to consumers supplied through pipes existing at the date of the Act as well as those supplied through pipes laid after it, the rest of the section applies only to consumers of the latter class. But even so the contention that the earlier part of the section is not retrospective is open to serious objection. The presumption is that an Act which provided for a uniform rate of charge throughout the metropolis intended that the water should be supplied to all consumers on the same terms as to liability. The owner of a new house, who got his water on the terms of his being liable for repair of the pipe through which it was supplied, would really be paying more for the water than his neighbour who lived in an old house and was not liable to repair. Such a construction would defeat the object of the Act, which was to put all consumers on an equality. One of the "other purposes" mentioned in the title to the Act was the alteration of the law as laid down in *Chapman's Case* (1), and that purpose it effected by s. 19 coupled with the provision in s. 8 as to the obligation of the consumer to maintain the communication pipe. The words "to be provided and laid down and maintained by him" do not necessarily point to future pipes only. This question has already been before the Court in a case of *Stacey* v. *Gas Light and Coke Co. and Metropolitan Water Board.* (2) That was an action for damage caused by an escape of gas which it was alleged was contributed to by leakage of water from a communication pipe which it was said the Water Board were bound to repair upon the authority of *Chapman* v. *Fylde Waterworks Co.* (1) Phillimore J. gave judgment for the Water Board upon the ground that s. 8 of the Act of 1907 was retrospective and transferred the burden of repairing a communication pipe from the Water Board to the consumer as well in the case of old pipes as in the case of pipes newly laid. It was on the authority of that decision that the county judge decided the present case. Thirdly, s. 28 of the Metropolis Water Act, 1871, imposes upon the owner or occupier

(1) [1894] 2 Q. B. 599. (2) Not reported.

1911

BATT v. METROPOLITAN WATER BOARD.

of the house the obligation of keeping in repair the "fittings" prescribed under the authority of that Act for the purpose of preventing the waste of water. By s. 3, "The term 'fittings' includes communication pipes and also all pipes cocks cisterns and other apparatus used or intended for supply of water by a company to a consumer and for that purpose placed in or about the premises of the consumer." This stop-cock box, therefore, which was only one foot from the external wall of the premises, was a fitting which the consumer, and not the Water Board, was bound to repair.

RIDLEY J. I am of opinion that the judgment of the county court judge should be reversed. That judgment proceeded upon the ground that s. 8 of the Metropolitan Water Board (Charges) Act, 1907, is retrospective in its operation, and in so deciding the judge seems to have followed an earlier decision of Phillimore J. In that reading of the section I very much regret that I am unable to concur. It is a well-recognized principle of the construction of statutes that, as was said by Willes J. in *Phillips* v. *Eyre* (1), "the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature." That being so, we must look at the section and see whether it is necessary so to read it. So far from its being necessary to read it as being retrospective it seems to me that the natural interpretation of the language is the other way. It says that "the Board shall at the request of the owner or occupier of any house . . . . furnish to such owner or occupier . . . . by means of a communication pipe . . . . and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes." That language surely can have no reference to existing pipes; it only says what is to be done in the case of pipes thereafter to be laid down. I cannot think that it was intended thereby to alter the rights of the parties interested in the box and to transfer the burden of the repair from the Water Board to the consumer. If then that section does not

(1) (1870) L. R. 6 Q. B. 1, at p. 23.

apply to the present case, it is covered by the principle of *Chapman* v. *Fylde Waterworks Co.* (1) In that case, which raised the question whether the water company was responsible for the defective condition of a similar stop-cock box, Lord Esher said (2): "In my opinion the fact that the apparatus in question formed part of the surface of a street, which would be used by the public, imposed upon the person who had the control of it a duty to keep it in repair, so as not to endanger the safety of the public." He then pointed out that it was for the benefit not only of the occupier but also of the company that the box should be there and that the company alone had power to break up the street for the purpose of repairing it, and said: "At the most it is put in for the joint benefit of the company and the householder. Therefore this apparatus is placed in the public street at any rate partly for the benefit of the company and the company alone have power to keep it in repair. Under these circumstances in my opinion a duty to the public is imposed upon the company to keep it in proper repair so as not to be dangerous to the public." But then Mr. Ross Brown says that *Chapman's Case* (1) does not apply because the box here is in the metropolis and is governed by special legislation which did not affect the box in *Chapman's Case*. (1) He contends that the consumer here was liable under s. 28 of the Metropolis Water Act, 1871, to repair the box as being one of the "prescribed fittings." No doubt if he could bring himself within that section it would afford a defence. But in order to do so he must shew that the box was provided by the owner or occupier of the premises in obedience to a notice served upon him under that section requiring him to provide it; and of that there is no evidence at all. Under these circumstances I think the defendants established no defence and that the appeal must be allowed.

AVORY J. If the judgment of the county court judge proceeded upon the view that ss. 8 and 19 of the Metropolitan Water Board (Charges) Act, 1907, are retrospective, I can only say that I respectfully differ from him and also from Phillimore J., whose opinion he seems to have followed. Assuming that the

(1) [1894] 2 Q. B. 599. (2) Ibid. at p. 603.

1911

BATT v. METROPOLITAN WATER BOARD.

AVORY J.

Act of 1907 does not apply so as to impose a liability on the occupier of these premises in Amery Place to keep this stop-cock box in repair, the only question is whether the case can be distinguished from *Chapman* v. *Fylde Waterworks Co.* (1) It had been, before the decision in that case, decided in *East London Waterworks Co.* v. *St. Matthew, Bethnal Green* (2), that the water company had power under the Waterworks Clauses Act, 1847, to insert these stop-cock boxes in the street and that the highway authority had no power to interfere with them. And in *Chapman's Case* (1) the Court of Appeal held that such boxes, whether they are the property of the water company or not, are to be repaired by them, and that in the event of their becoming dangerous and causing injury to the public the water company are liable to be sued. But it was contended that *Chapman's Case* (1) was distinguishable on the ground that the stop-cock box there was in Lancashire and not in London, and it was argued that a liability to repair the box in the present case was imposed on the occupier of the house by s. 28 of the Metropolis Water Act, 1871. The answer to that contention is that there is nothing to shew that the box was provided under that section, that any notice was served on the occupier to provide it, or that in pursuance of such a notice he provided it. Moreover, having regard to the fact that that Act of Parliament was only designed to provide for a constant supply of water, and for that purpose enacted that for the protection of the company waste-preventing fittings should be provided, I very much doubt whether s. 28 applies at all to such a fitting as this stop-cock box. It has already been a matter of doubt whether the definition of "fittings" in s. 3 would include a communication pipe or stop-cock box wholly outside the premises, as is the case here, the words of the definition being "placed in or about the premises of the consumer." On that point I would refer to the case of *Colne Valley Water Co.* v. *Hall.* (3) That was a case of a defective service pipe running from the main to the defendant's house, the defect being outside the defendant's premises and beneath a public highway. The

(1) [1894] 2 Q. B. 599. (2) (1886) 17 Q. B. D. 475.
(3) (1908) 98 L. T. 398.

company there sued the occupier for the expense of putting the pipe in repair. The Court held that the defendant was not bound to repair a communication pipe outside his premises even if it was his property. In the Court of Appeal Lord Alverstone C.J. said: "As to the question of whether or not a person who does own a pipe permits it to be out of repair when it gets out of repair under a highway I express no opinion upon it. Phillimore J. in his judgment has expressed an opinion with regard to that, though I do not think it was necessary to do so, and I should require further argument before expressing an opinion upon the point." But with regard to this stop-cock box, which is not shewn to have been put down under the Act of 1871, the case seems to me to be entirely covered by the decision in *Chapman* v. *Fylde Waterworks Co.* (1), and for these reasons I agree that the judgment should be reversed.

Appeal allowed.

Solicitors for plaintiff: *Arnold & Cubison.*
Solicitor for defendants: *Walter Moon.*

(1) [1894] 2 Q. B. 599.

J. F. C.

C. A.
1911
Feb. 14, 15.

[IN THE COURT OF APPEAL.]

TALBOT *v.* VON BORIS AND WIFE.

Negotiable Instrument—Promissory Note—Signature procured by Duress—Knowledge of Duress by Holder of Instrument—Burden of Proof—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 30, *sub-s.* 2.

To an action against a wife upon joint and several promissory notes of her husband and herself, signed by her as surety for the repayment of sums advanced by the plaintiff to her husband, the defendant pleaded that she was induced to sign the notes by duress on the part of her husband, and that the plaintiff knew of that duress. At the trial evidence was given by the defendant of the duress so alleged, and the jury found that there was such duress. No evidence, however, was given on the defendant's part to shew that the plaintiff knew of the duress, but on the contrary she stated in evidence that she did not think that the plaintiff knew of it. The plaintiff was not called as a witness, and, consequently, did not give evidence to negative his knowledge of the duress:—

Held, that the onus of proof with regard to knowledge of the duress by the plaintiff lay upon the defendant, and was not shifted by s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, upon the plaintiff, and, therefore, the plaintiff must succeed.

The provision of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, by which, "if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill," does not apply to a case where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose possession it remains.

APPLICATION for judgment or a new trial in an action tried by Phillimore J. with a jury.

The action was brought upon two joint and several promissory notes for 400*l.* and 100*l.*, respectively, by the plaintiff, as the payee, against the defendants, who were husband and wife, as the makers of the notes, to recover sums of money which had been advanced by the plaintiff to the husband on the security of the notes, the wife having joined in making the notes as surety for the repayment by the husband of the sums advanced. The writ had not been served upon the husband, who had left the country. The

wife, hereinafter referred to as "the defendant," pleaded by way of defence to the action that she was induced to sign the promissory notes by duress on the part of her husband, and that the plaintiff had at all material times notice of that duress. (1) At the trial of the action the defendant gave evidence to the effect that violence had on several occasions been used to her by her husband and that it was fear of his violence which induced her to sign the notes; but no evidence was given by her to shew that the plaintiff knew anything about duress practised upon her by her husband. On the contrary she said in answer to a question in cross-examination that she did not think that the plaintiff knew of her husband's treatment of her. It appeared that the plaintiff had not come into personal communication with either of the defendants in the transactions which ended in the signing of the notes, those transactions having been effected through an intermediary named Ball, who was employed by the husband to procure the advances of money for him, and in whose presence the notes were signed. Ball was called at the trial, and denied any knowledge of duress exercised by the husband towards the defendant. The plaintiff was not called as a witness, and consequently gave no evidence negativing knowledge of the duress on his part. The jury found in answer to questions left to them by the learned judge that the defendant's signature to both the notes was obtained by duress; that certain amounts had been advanced by the plaintiff on the notes respectively; and that the plaintiff did not know of the duress. In leaving the question as to the plaintiff's knowledge of the duress to the jury, the learned judge said to them that he presumed that after the defendant's evidence they would answer that question in the negative. Upon the findings of the jury the learned judge entered judgment for the plaintiff.

(1) Other matters were set up by way of defence besides duress by the husband, one being that the nature of the transactions had not been sufficiently explained to the defendant, but with regard to these matters the defence proved unsuccessful upon the facts; and, inasmuch as no question of law with regard to these matters was ultimately involved, the facts and findings of the jury, and the arguments and judgments in the Court of Appeal, so far as they related thereto, have been omitted from the report.

C.A. 1911

TALBOT v. VON BORIS.

The defendant thereupon gave notice of application for judgment or a new trial on the grounds (among others) that the judge was wrong in declining to enter judgment for the defendant on the findings of the jury on both the notes; that there was no evidence to support the finding of the jury that the plaintiff did not know of the duress; that it was proved that the notes in question had been affected by duress, and there was no affirmative evidence that subsequently to such duress value had in good faith been given for the said notes; and that the learned judge was wrong in not leaving to the jury with a proper direction the question whether subsequent to the duress value had in good faith been given for the said notes. (1)

A. J. David, K.C., and *B. Adler*, for the defendant. The defendant is upon the evidence and the findings of the jury entitled to judgment. The effect of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, is that, as soon as it is established that the making of a promissory note was obtained by duress, the onus of proof is shifted, and the payee must shew by affirmative evidence that he gave value for the note, and that he gave it in good faith: see *Tatam* v. *Haslar*. (2) A payee of a promissory note is as much its holder as an indorsee would be for the purposes of s. 30, and the plaintiff therefore was a holder of these notes for the purposes of the section: see per Fletcher Moulton L.J. in *Lloyd's Bank Limited* v. *Cooke*. (3) It was therefore incumbent on the plaintiff, when the duress was proved, to go into the witness-box and swear that he had no knowledge of the duress, and that, when he gave value for the notes, he had no such knowledge. It is true that the defendant admitted that

(1) By s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, "Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." By s. 89, sub-s. 1, the provisions of the Act relating to bills of exchange are, with certain modifications, which are not material for the purposes of this report, applied to promissory notes.

(2) (1889) 23 Q. B. D. 345.

(3) [1907] 1 K. B. 794, at pp. 807, 808.

she did not think that the plaintiff knew of the duress, but it is submitted that such an admission is not evidence which satisfies the requirements of the section, or which would absolve the plaintiff from proving that he had no knowledge of the duress in the sense explained by Lord Blackburn in *Jones* v. *Gordon*. (1) There was not, in the absence of any affirmative evidence by the plaintiff, any evidence to justify the finding of the jury that the plaintiff did not know of any duress, and the question of his knowledge ought not to have been left to the jury at all. At any rate the judge ought, in leaving the case to the jury, to have pointed out to them that the burden of proof on that question rested upon the plaintiff, and that it was for him to establish that he did not know of the duress, whereas he really left the case to the jury on the basis that the onus lay on the defendant. On that ground, therefore, even if the defendant is not entitled to judgment, there ought to be a new trial.

W. H. Moresby, for the plaintiff. In general, where it is sought to avoid a contract on the ground of duress exercised, not by the plaintiff, but by some third person, it would lie on the party seeking to avoid the contract to shew knowledge of the duress by the other party. The contract upon a promissory note, apart from s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, is no exception to this rule. The language of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, shews that it only applies to cases where there has been a negotiation of the negotiable instrument subsequent to the acceptance, issue, or negotiation thereof which is affected by fraud or illegality. The last part of the sub-section shews by its terms that it cannot apply as between the original parties to the issue or negotiation affected by fraud or illegality. The original payee of the note would in the ordinary course of things know of the fraud, if any, with which it is affected. Therefore the onus of proving that the plaintiff knew of the duress lay on the defendant; and the defendant did not give, or attempt to give, any evidence to shew that he knew of it, but on the contrary admitted that she thought that he did not know of it. The fact that the plaintiff never came into personal communication with the makers of the notes, and the evidence of Ball, so far as it

(1) (1877) 2 App. Cas. 616, at p. 629.

C. A. 1911

TALBOT v. VON BORIS.

went, tended to shew that he did not know of it. If any evidence had been given, however slight, tending to shew that the plaintiff knew of the duress, or of any circumstances calling for explanation on his part with regard to that issue, it might have been incumbent on him to go into the witness-box and give evidence to negative knowledge on his part, or to explain such circumstances, but there is no law calling upon a litigant to give evidence to negative something of which there is no evidence whatever, and which has really never been suggested in evidence by the other party. [He cited Chalmers on Bills of Exchange, 7th ed., p. 99; *Raphael* v. *Bank of England*. (1)]

A. J. David, K.C., for the defendant, in reply. It is submitted that at common law, and, even if the provisions of the Bills of Exchange Act, 1882, s. 30, sub-s. 2, do not apply in such a case as this, as soon as it is proved that the defendant's signature to the notes was obtained by duress, the onus of negativing knowledge of that duress is thrown upon the plaintiff.

VAUGHAN WILLIAMS L.J. The decision of this appeal appears to me to involve a question with regard to the true construction of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882. In this case it is not disputed that the defendant signed the notes upon which the action is brought. The main defence which it was sought upon her part to set up was that she signed them under duress on the part of her husband. The question which in this case we really have in the first place to decide seems to me to be whether, the defence being founded on duress, and there being not only evidence of duress by the husband for the jury, but also a finding by the jury that the signing of the notes by the defendant was procured by such duress, the result is to throw upon the plaintiff, as the holder of the notes, the onus of proving affirmatively that he gave value for them in good faith. I think that the appeal really involves that question, although it will be seen, when attention is called to the questions put to the jury and their answers thereto, that, even assuming that this onus is thrown on the plaintiff by virtue of the terms of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, it may be open

(1) (1855) 17 C. B. 161.

to him to contend upon the findings of the jury that he has discharged it.

Before I deal with s. 30, I will refer first to the findings of the jury, and secondly to the grounds set forth in the notice of appeal, in order to shew how it is suggested that the provisions of the section ought to be applied in the present case. The first two questions left to the jury by the learned judge were as follows: (1.) "Was the signature of Mrs. Von Boris to the promissory note for 400*l.* obtained by duress?" (2.) "Was the signature of Mrs. Von Boris to the promissory note for 100*l.* obtained by duress?" To both those questions the jury returned an affirmative answer. Another question left to the jury by the learned judge was whether the plaintiff knew of the duress, if any, and this question the jury answered in the negative. The particular evidence on this last question seems to have been that of the defendant herself, who said, in answer to a question on the subject, that she did not think that the plaintiff knew of her husband's treatment of her. On that piece of evidence, I think, the jury must be taken to have acted, because it appears to be really the only piece of evidence which went to prove that the plaintiff did not know of the duress, and the learned judge, in summing up the case to the jury, when he dealt with that question, suggested that probably after that answer by the defendant they would find that the plaintiff did not know of any duress.

The first ground of appeal is that the learned judge was wrong in declining to enter judgment for the defendant upon the findings of the jury as to both the notes. So far as the findings of the jury are concerned, I do not see how this ground of appeal can be supported. Really the only substantial ground of defence in this case appears to be that based upon duress. As to that it is true that the defendant succeeded in getting a finding of the jury in her favour that her signature to the notes was procured by duress, but she failed to get a finding in her favour as to knowledge by the plaintiff of that duress, for the jury found that he did not know of it. The only way in which, as it seems to me, the case for the defendant can be put is, not upon the findings of the jury, but on the contention that, by virtue of the provisions of s. 30, sub-s. 2, of the Bills of

C. A.
1911
TALBOT
v.
VON BORIS.
Vaughan Williams L.J.

Exchange Act, 1882, the onus was thrown upon the plaintiff of proving that he gave value for the notes in good faith. It was contended in argument that, notwithstanding the fact that the defendant said that she did not think that the plaintiff knew of the duress, in the absence of any affirmative proof on the part of the plaintiff that he took the notes in good faith, the state of the case was such that the defendant was entitled to have the judgment entered for her upon the findings of the jury. I cannot assent to that contention. I think that in the face of the findings of the jury it is impossible to enter judgment for the defendant. The third ground of appeal is that there was no evidence to support the finding of the jury that the plaintiff did not know of the duress, if any. I do not think that we can say that there was no evidence to support this finding. I am not sure that I should have directed the jury that, after the answer of the defendant to which I have alluded, their answer to the question put to them must necessarily be that which they have given, but that is not what is complained of in the grounds of appeal. The complaint is that there was no evidence to support the finding. I am not prepared to say that this is so. The fourth ground of appeal is that "it was proved that the notes in question had been affected by duress, and there was no affirmative evidence that subsequently to such duress value had in good faith been given for the said notes." That ground of appeal does seem to me to throw upon us the obligation of construing s. 30, sub-s. 2, of the Bills of Exchange Act, 1882. The fifth ground of appeal is that the learned judge was wrong in not leaving to the jury with a proper direction the question whether subsequent to the duress value had in good faith been given for the said notes. That ground really raises the same point as the fourth in a somewhat different form.

I will now proceed to deal with the construction of s. 30 of the Bills of Exchange Act, 1882. The first sub-section of that section is that "Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value." That sub-section does appear to include the original parties to a bill or note. By sub-s. 2, "Every holder of a bill is prima facie deemed to be a holder in due course"; and then follows the

provision as to shifting the burden of proof, which runs thus: "but, if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted." Pausing there for a moment, if those words had stood alone, I think they might have been treated as including the original or immediate parties to a negotiable instrument or the negotiation of such an instrument, whether a bill, note, or cheque; but when one reads on and finds the words of the latter portion of the sub-section, which are as follows, "unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill," I think one must take those words into consideration in construing the earlier words. Those latter words of the sub-section to my mind shew that its provisions were not intended to apply to a case where the instrument, whether a bill or a note or a cheque, remains in the hands of the person to whom it was originally delivered. According to my view, therefore, the practical result is that the sub-section ought not to be applied to any case in which the holder who is seeking to enforce a negotiable instrument is the person to whom the instrument was originally delivered, and in whose possession it still remains.

It was urged at one time during the argument of this case that it did not really matter whether s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, applied or not, because, at common law, as between the original parties to a negotiable instrument, and even in cases where the person to whom the instrument was originally delivered remained in possession of it, and was seeking to enforce it, the rule applicable in such a case as this was to the same effect as the provision applicable under the last clause of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882. I have looked into the authorities, and have come to the conclusion that this contention cannot be supported. In the case of *Watson* v. *Russell* (1) Crompton J., in delivering the judgment of the majority of the Court (himself, Blackburn J., and Mellor J.), which was afterwards affirmed in the Exchequer Chamber, said: "If A., by means of a false pretence, or a promise or condition which he

(1) (1862) 3 B. & S. 34; (1864) 5 B. & S. 968.

C A. 1911

TALBOT v. VON BORIS.

Vaughan Williams L.J.

does not fulfil, procures B. to give him a note or cheque or acceptance in favour of C., to whom he pays it, and who receives it bona fide for value, B. remains liable on his acceptance." Then come the important words: "His acceptance imports value and liability prima facie, and he can only relieve himself from his promise to pay C. by shewing that C. is not holder for value or that he received the instrument with notice, or not bona fide." That would seem to import that in a case like this at common law the onus of displacing the prima facie title of the payee by proof that it is invalid by reason of fraud or illegality rests on the defendant, and the onus of proof is not cast on the plaintiff as in cases under s. 30, sub-s. 2. If one looks at that portion of Taylor on Evidence, 10th ed., where the learned author deals with presumptions, namely, sections 368, 369, 370, pp. 286, 287, I think it is apparent that he takes the same view. He begins by saying that the presumption in such a case is that the instrument was given for good consideration, and goes on to say that, if the defendant intends to set up the defence that value has not been given, or that the instrument was originally obtained by fraud, the burden of proving that lies on him. In my judgment, therefore, the defendant here cannot rely on the common law, if she is unable to bring the case within the language of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882. I think that the burden of proving that the plaintiff knew or had notice of the duress exercised by the husband rested on the defendant, and therefore the only substantial defence set up by her fails, and this application must be dismissed.

FARWELL L.J. I also am of opinion that this application fails. The plaintiff advanced money to the defendant's husband upon joint and several promissory notes made by the husband and wife, upon which notes the action is brought. The jury have found that the defendant's signature to the notes was procured by duress on the part of her husband, but that the plaintiff did not know anything about that duress. In my opinion, the law as to onus of proof as regards duress is the same as between the maker of a promissory note and the payee who advances money upon it as in the case of any other contract

in respect of which the defence of duress is set up. To support such a defence, where the alleged duress is that of a person other than the person contracted with, it must be shewn that the duress by which the contract was procured was known to the plaintiff when he entered into the contract. Therefore, if the jury negative knowledge on the part of the plaintiff, the plaintiff must succeed. Here this defendant could not succeed, unless she pleaded and proved, in addition to duress on the part of her husband, knowledge by the plaintiff of that duress. Both these elements were necessary to constitute the defence, and in my opinion the onus of proof in respect of both of them lay upon her. Vaughan Williams L.J. has already cited a case which shews that the same law in this respect applies as between the maker of a promissory note and the payee advancing money upon it as in the case of any other contract. The test is thus stated in Taylor on Evidence, 10th ed., chapter III., p. 283, where the author deals with "Burthen of Proof." He says in s. 365: "The best tests for ascertaining on whom the burthen of proof lies are, to consider first which party would succeed if no evidence were given on either side: and secondly what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued." It appears to me clear, therefore, that in such a case as this the burden of proof lies upon the defendant.

Then, does it make any difference that in the present case the makers of the notes were husband and wife? I think not. The same point has been raised and decided in this Court in *Howes* v. *Bishop* (1) and in a previous case of *Bischoff's Trustee* v. *Frank* (2) in the Court of Appeal, referred to in the judgment of the Lord Chief Justice in that case. A decision to the contrary effect would mean that every one who takes a promise or contract from a husband and wife would be put on inquiry whether the husband had coerced the wife by violence, as in the present case, or, as alleged in *Howes* v. *Bishop* (1), by the exercise of undue influence. The effect of the decision in the last-mentioned case is put in the head-note thus: "There is no general rule of universal application that the rule of equity

(1) [1909] 2 K. B. 390. (2) Unreported.

C. A. 1911

TALBOT v. VON BORIS.

Farwell L.J.

as to confidential relationships necessarily applies to the relation of husband and wife, so as to throw on the husband, or on the person who is suing the wife, the onus of disproving an allegation of undue influence." That proposition is attributed in the head-note to the Lord Chief Justice and Fletcher Moulton L.J., and not to myself, but I did not in any way dissent from the judgments of the other members of the Court, though I went somewhat further than they did. The Lord Chief Justice cited in giving judgment the following passage from the judgment of Romer L.J. in *Bischoff's Trustee* v. *Frank* (1) in the Court of Appeal: "The learned judge says that the husband is to be treated as a voluntary donee from the wife, because the wife was going to guarantee the husband's debts. That being so, the plaintiff must be taken as a person who knows that, and therefore has the onus of proving that there was no undue influence. I never heard of such a thing. . . . . Unless you try to make out that, whenever a wife wishes to help her husband with regard to borrowing money, the creditor is to assume undue influence, you cannot maintain such a proposition . . . . If you say she was influenced by the fact that her husband wanted money, I agree she was: but that is not undue influence." That decision is binding upon us; and the present case is stronger, for it would not accord with the common understanding of mankind to assume that the husband in such a case as this had used violence in order to procure his wife's signature to the note. Something has been said about the plaintiff's not going into the witness-box. I know of no rule of law which requires a litigant in a case like this to go into the witness-box to disprove knowledge when no ground has been suggested for attributing it to him. If any fact be proved from which prima facie an inference unfavourable to a litigant may legitimately be drawn, and he declines to go into the box to give an explanation of it, it may then, no doubt, be legitimate to draw an inference from his refusal to do so, but I do not think that it is legitimate to draw an unfavourable inference from the mere fact of his absence from the box, when no foundation has been laid for the suggestion that he ought to have been called. In the present case the evidence of the

(1) Unreported.

defendant and the circumstances of the case do not suggest knowledge by the plaintiff of the duress, but the contrary.

The only other point is as to the construction of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882. I agree with Vaughan Williams L.J. that up to a certain point in that sub-section the language is such as might include the payee originally advancing money to the maker of a promissory note as in the present case. The hypothesis upon which the sub-section proceeds is that the original issue of the negotiable instrument is affected with fraud or duress, or illegality, i.e., that the person who originally took the instrument is in some way affected by his own misconduct, so as to vitiate the instrument in his hands. In that case the effect of the sub-section clearly is that a subsequent holder cannot enforce the instrument unless he can shew that, subsequently to the alleged fraud or illegality by which the issue of the instrument is affected, he gave value in good faith for the instrument; but the language of the sub-section does not seem to me to be consistent with its provisions being applicable as between the parties to the original transaction by which money was borrowed and lent upon the notes. I do not think that there is in this construction of the sub-section anything inconsistent with Fletcher Moulton L.J.'s dictum in *Lloyd's Bank Limited* v. *Cooke*. (1) The whole tenor of his observations was "that the Act did not intend to impair the position of a payee as contrasted with that of an indorsee, and that a payee who has given value in good faith is intended to come within its provisions as a 'holder in due course' just as much as an indorsee," and that "such a payee since the Act still occupies the favourable position which he would have had before the Act by virtue of the law of estoppel as applied to a case where a promissory note has been signed in blank by the maker and entrusted to another person to fill up." I agree with that view, but I do not think that the learned Lord Justice was dealing with the point upon the construction of s. 30, sub-s. 2, with which we are dealing. He was dealing with the general meaning of the terms "holder" and "holder in due course" in the Bills of Exchange Act, 1882, as applicable to the position

(1) [1907] 1 K. B. 794, at pp. 807, 808.

C. A. 1911

TALBOT v. VON BORIS.

Farwell L.J.

of the payee of a negotiable instrument; and he, in so doing, cited s. 30, sub-s. 2, which begins with the words "Every holder of a bill is prima facie deemed to be a holder in due course," as bearing upon that question. In my opinion, s. 30, sub-s. 2, does not apply to the present case, and therefore the arguments as to the shifting of the onus of proof, which have been put forward on behalf of the defendant, have no foundation.

KENNEDY L.J. I also am of opinion that this application should be dismissed. There was, so far as I can see, really no evidence that the plaintiff had any knowledge or notice that the defendant's signature to the promissory notes was obtained by duress on the part of her husband. The plaintiff appears never to have been brought into personal communication with either the defendant or her husband in connection with the transactions which led to the giving of the notes; and, if Ball, who negotiated those transactions on behalf of the defendant's husband, could be treated as being to any extent the agent of the plaintiff in the matter, in which case his knowledge might be attributable to the plaintiff, he too appears on the evidence to have had no knowledge or notice of any duress exercised towards the defendant by her husband. It was really not suggested in evidence that either the plaintiff or Ball had any such knowledge or notice, but merely that the defendant had been driven to sign the notes through habitual fear of her husband's violence. Upon the evidence, a finding by the jury that the plaintiff knew that the defendant was induced to sign the notes by duress on the part of her husband would really, in my opinion, have been perverse. The result of the evidence, therefore, is that the defendant was induced to sign the notes by duress on the part of her husband, but that the plaintiff did not know this. That being so, there appears to me to be an end of the case. But, even if the effect of s. 30, sub-s. 2, were in a case arising between the original parties to the note to shift the onus of proof, I think on the evidence here the plaintiff would be entitled to succeed. By "proof" in this sub-section is meant merely evidence upon which a jury would be entitled to base a verdict. If, as was the case here, a defendant, who proves that he has

been induced to sign a note by duress, also goes on to give evidence which shews that the plaintiff did not know of the duress, then, as it appears to me, he, by this further evidence as to absence of knowledge by the plaintiff, removes the onus which, if the sub-section applies, might otherwise have been cast upon the plaintiff by the first part of his evidence. As regards the common law on this subject, it is quite clear that a litigant who alleges fraud or want of bona fides as a ground for avoiding a contract to which he was a party must prove it. In *Whitehorn Brothers* v. *Davison* (1), recently decided in this Court, it was held that, "where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, and, before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the onus lies on the seller who seeks to avoid the sale, and recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith." In the case of negotiable instruments, the effect of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, no doubt is that, with regard to subsequent holders, who are not immediate parties to the instrument, as soon as it is proved that the instrument is affected as between the immediate parties by fraud or duress, the burden of proof is shifted, and the holder must prove that value has in good faith been given for the instrument; but, with regard to the construction of that sub-section, I agree with Vaughan Williams L.J. that the language of the latter part of the sub-section commencing with the words "unless and until" appears only to permit the application of the sub-section to holders who become so subsequently to the fraud or illegality practised as between the original and immediate parties. But, even if it were otherwise, I doubt whether that would make any difference here, because, as I have said, the only evidence of the duress was given by a witness who proceeded to remove the burden of proof which might otherwise have rested on the plaintiff, inasmuch as she stated in effect that the plaintiff did not know of the duress. In some cases, no doubt, it may be essential that a litigant should be

(1) Ante, p. 463.

C. A. 1911

TALBOT v. VON BORIS.

Kennedy L.J.

called to explain matters in evidence, as to which his absence from the witness-box may properly be ground for an unfavourable inference; but, when there was really nothing to answer, I do not know of any law by which the plaintiff was required to go into the box in order to prove that he had no notice of duress alleged to have been exercised by the husband in this case. Ball, who negotiated the transactions, did go into the box, and said that he knew nothing of the alleged duress. Therefore, although, so far as it is necessary to express an opinion on the subject, I concur in the judgments which have been pronounced as to the effect of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, which qualifies the general rule of the common law on the subject, I desire further to add that I do not think that in the present case it really matters whether the sub-section is applicable as between original parties to the instrument or not; because here, the defendant herself not only did not in her evidence assert knowledge of the duress by the plaintiff, but on the contrary said that she did not think that the plaintiff had any knowledge of it. For these reasons I agree that the application should be dismissed.

Application dismissed.

Solicitors for plaintiff: *Jacksons, Elwell & Curran.*
Solicitors for defendant: *Goodacre, Harrison & Darrell.*

E. L.

CAMPBELL *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF PADDINGTON.

1911
Feb. 1, 2.

Public Nuisance—Special Damage—Obstruction of View—Pecuniary Loss.

The plaintiff was in possession of a house in London from the windows of which there was an uninterrupted view of part of a certain main thoroughfare along which it was announced that a public procession was to pass. One G. agreed to take and pay for seats on the first and second floors of the house in order to see the procession. The defendants, a metropolitan borough, in pursuance of a resolution of their council to that effect, caused a stand to be erected across a certain highway (in which the plaintiff's house was situate) to enable the members of the council and their friends to view the procession. This stand was a public nuisance, and it obstructed the view of the main thoroughfare from the windows on the first floor of the plaintiff's house. G., when he saw the stand in process of erection, asked to be released from his contract as to the seats on the first floor, and the plaintiff, thinking it would be unfair to hold him bound, released him. Several other persons came to the house to apply for seats, but when they saw the obstruction refrained from taking seats.

In an action by the plaintiff to recover damages for the wrongful interference with the use and enjoyment of her house and the special loss she had sustained by the wrongful act of the defendants:—

Held, that she was entitled to recover as damages the profit which but for the defendants' act she might have made by letting seats.

Appeal from the Marylebone County Court.

The plaintiff was the tenant of No. 5, Burwood Place, Edgware Road, in the borough of Paddington. She was in the habit of letting seats in rooms having windows facing Edgware Road to persons wishing to view public processions passing down that road.

Soon after the death and before the date announced for the funeral of His late Majesty King Edward VII. one Albert Ginger offered the plaintiff 40*l.* for the use of a balcony on the first floor and 20*l.* for the use of two windows on the second floor of No. 5, Burwood Place, with a view of seeing the funeral procession. This offer was accepted, and Ginger paid to the plaintiff 20*l.* on account of the 60*l.* payable under the contract.

On May 9, 1910, the borough council passed a resolution in the following terms:—"Death of King Edward VII. Resolved that, as a mark of loyalty to the Throne and of respect to the

1911

CAMPBELL v. PADDINGTON CORPORATION.

memory of His late Majesty, the Aldermen and Councillors of Paddington do assemble on the day of the funeral and that, in the event of the cortege passing through the borough, the Works Committee be authorized to erect a suitable stand, capable of accommodating the council and their friends, the cost thereof to be borne by the members."

On May 10, 1910, the Works Committee passed the following resolution:—"Death of King Edward VII. Resolved that prices be obtained for the erection of the stand in accordance with the resolution of the council, and that it be left in the hands of the chairman and the borough surveyor to have the work done in the manner considered to be most satisfactory."

In pursuance of these resolutions the defendants on the evening of May 13 began to lay down by the side of Burwood Place timber for the purpose of erecting a stand across Burwood Place. On the following days the erection of the stand was in process. On Monday, May 16, it was taken down and recommenced soon afterwards, and the erection proceeded until late on the night of Thursday, May 19. The stand was 29 feet 9 inches in length and 29 feet in width; its height was 4 feet 5 inches in front and 10 feet 10 inches at the back.

On Saturday, May 14, Ginger called on the plaintiff and said that in view of the stand being erected it would not be fair to hold him to his bargain. He was willing to keep and did keep the second floor, in respect of which the plaintiff retained the sum of 20*l.* mentioned above. The plaintiff consented to release him from the rest of his bargain. Some thirty or forty other persons came to the plaintiff to apply for seats, but, seeing the stand in process of erection, refrained from hiring seats. When the stand was completed it was a serious obstruction to the plaintiff's view of Edgware Road.

The plaintiff brought an action in the Marylebone County Court claiming damages for obstruction of the use and enjoyment of her house.

The county court judge directed the jury that the prospect of letting rooms or seats in her house to persons desirous of viewing public processions passing along Edgware Road was an incident attaching to the plaintiff's occupation which appeared by the

evidence to have a substantial pecuniary value, and that if any one deprived her of or injured her prospect of letting rooms for that purpose by erecting an unlawful obstruction in the highway, she was entitled to maintain an action to recover damages in respect of the loss sustained by her. He further directed the jury that the act of the defendants in authorizing the erection of the stand was an illegal act, and that the defendants were liable for the individual loss sustained by the plaintiff in consequence thereof, if she had in fact sustained any loss therefrom in addition to the inconvenience common to the general public.

On the question of damages the county court judge told the jury that as against the defendants, being wrong-doers, it was not incumbent on the plaintiff to insist on performance by Ginger of his contract with her, if she could no longer, through the action of the defendants, give him the accommodation which they both expected him to have when he agreed to take the first floor of No. 5, Burwood Place. He asked the jury whether in their opinion it was a reasonable, fair, and proper thing for the plaintiff to release Ginger in consequence of the action of the defendants, and told them that, if so, they might properly take her loss into consideration in assessing damages.

After reviewing the evidence the county court judge put the following questions to the jury:—(1.) Whether the action of the defendants had in fact so far obstructed the view from the first floor as to involve the plaintiff in loss; (2.) whether it had in fact so far obstructed the view from the ground floor as to involve the plaintiff in loss.

The jury returned a verdict for 90*l.*, and judgment was given accordingly.

The defendants appealed.

Arthur Powell, K.C., and *C. E. Allan*, for the appellants. No right of the respondent was infringed by the appellants' act. There is no such right known to the law as a right of prospect or view from the windows of a house, "which is a matter only of delight and not of necessity": *Aldred's Case* (1); *Knowles* v.

(1) (1610) 9 Rep. 57b, at 58b.

1911

CAMPBELL v. PADDINGTON CORPORATION.

Richardson (1); *Attorney-General* v. *Doughty* (2); *Dalton* v. *Angus*. (3)

[AVORY J. The erection of the stand was a wrongful act, a public nuisance; and the loss to the plaintiff was special damage. If the damage is the direct result of the wrongful act an action lies to recover it.]

The erection of the stand was not a public nuisance: *Rex* v. *Bartholomew*. (4) It caused no substantial obstruction or hindrance to the public, because during the procession there was no passage up or down Burwood Place. Even if the stand was a public nuisance the loss which the plaintiff suffered was not a loss in any way connected with the right of passage along Burwood Place. In other words, that loss was not the direct result of the nuisance. It was an accidental result and therefore not the subject of an action. The principle of *Gorris* v. *Scott* (5) applies.

Secondly, the respondent cannot recover the 40*l*. which Ginger agreed to pay for the first floor. She voluntarily released him from that payment when she was, and is now, legally entitled to recover it from him. She cannot make the appellants pay Ginger's debt.

Thirdly, the appellants, not having themselves erected the stand and not being capable of authorizing the erection of a public nuisance, are not liable in this action: *Poulton* v. *London and South Western Ry. Co.* (6) The individuals who authorized the erection are the only persons responsible: *Mill* v. *Hawker*. (7)

Kingsbury, for the respondent. The law as laid down in *Aldred's Case* (8) and the other cases cited on behalf of the appellants on the first point is not denied. A view or prospect from the windows of a house is not an easement or right in the nature of an easement. If a person by an innocent act obstructs the view or prospect, it is conceded that no action lies against him. But if he does this by means of a wrongful act, that is

(1) (1668) 1 Mod. 55.
(2) (1752) 2 Ves. Sen. 453.
(3) (1881) 6 App. Cas. 740, at pp. 823, 824.
(4) [1908] 1 K. B. 554.
(5) (1874) L. R. 9 Ex. 125.
(6) (1867) L. R. 2 Q. B. 534.
(7) (1874) L. R. 9 Ex. 309; but see S. C. on appeal, (1875) L. R. 10 Ex. 92.
(8) 9 Rep. 57b.

another matter. There are many instances of loss not recoverable if caused by an innocent act but recoverable if caused by a wrongful act. The hospitality of friends if withheld cannot be recovered, but if it be lost through the slander of another the loss is special damage which will support an action against the wrongdoer: *Moore* v. *Meagher* (1); *Davies* v. *Solomon.* (2) Similarly of the voluntary contributions of a congregation; if the plaintiff has been in actual enjoyment of them and through the slander of the defendant they are withheld, he has a right of action against the defendant: *Hartley* v. *Herring.* (3) On the same principle, if a person wrongfully obstructs a plaintiff's ancient lights and by the same act obstructs lights the right to which is not yet acquired, the plaintiff may recover for loss of the latter as well as the former: *In re London, Tilbury, and Southend Ry. Co. and Trustees of Gower's Walk Schools.* (4) "If a house is de facto supported by the soil of a neighbour, this appears to us to be sufficient title against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who, by removing it, causes the house to fall; but none against his neighbour, or one authorized by the neighbour to do so, if he took it away and caused the same damage": per Parke B., *Jeffries* v. *Williams.* (5) *Laing* v. *Whaley* (6) is to the same effect. The erection of the stand was a wrongful act of the appellants which directly caused loss to the respondent. That loss is recoverable. The present case comes within the principle of the case put by Willes J. in *Beckett* v. *Midland Ry. Co.* (7) "Suppose," said that learned judge, "the case of a man possessed of a house at a watering place, which he lets to visitors during the season, there being a carriage road between the house and the cliff, the soil of which is vested, not in the owner of the house, but say in the lord of the manor under an Inclosure Act, and a third person wrongfully narrows the road so that the house can no longer be approached by

(1) (1807) 1 Taunt. 39.
(2) (1871) L. R. 7 Q. B. 112.
(3) (1799) 8 T. R. 130.
(4) (1889) 24 Q. B. D. 326.
(5) (1850) 5 Ex. 792, at p. 800.
(6) (1858) 3 H. & N. 675.
(7) (1867) L. R. 3 C. P. 82, at p. 103.

1911

CAMPBELL v. PADDINGTON CORPORATION.

carriages, and the house in consequence will not let for so much as it did before,—would not that be such a damage to the house and to the owner's interest therein as to entitle him to maintain an action against the wrong-doer? I think it clearly would be."

[AVORY J. There the loss is connected with the right of passage. That is not so in this case.]

It is not necessary that the loss or damage in order to be recoverable should be connected with the right of passage: *Benjamin* v. *Storr*. (1)

Secondly, as to Ginger's contract, the respondent acted reasonably in releasing him from his promise to take the first floor. She was not bound to do more than to act reasonably. Wrong-doers like the appellants cannot insist that strict legal rights shall be rigidly enforced in their relief. Moreover, as the whole object for which the first floor was taken had failed, the respondent could not have recovered the 40*l*. from Ginger: *Krell* v. *Henry* (2); *Civil Service Co-operative Society* v. *General Steam Navigation Co*. (3); *Blakeley* v. *Muller* (4); *Hobson* v. *Pattenden*. (4)

As to the third point, the argument for the appellants would exempt corporations from all liability for torts.

Arthur Powell, K.C., in reply.

AVORY J. In this case the plaintiff brought an action against the defendants claiming damages for the obstruction of and interference with the free use, enjoyment, and occupation of her house known as No. 5, Burwood Place, Paddington. In the course of the trial the case, either as presented by counsel for the plaintiff or as presented by the judge to the jury, took rather the form of an action for special damage caused to the plaintiff by a public nuisance created by the defendants. In my opinion the action was maintainable in either form, but I think that beyond all question it is maintainable on the ground on which it was presented by the county court judge, that is to say, as an action for damages for the special and individual loss, in addition to the inconvenience common to the general public,

(1) (1874) L. R. 9 C. P. 400.
(2) [1903] 2 K. B. 740.
(3) [1903] 2 K. B. 756.
(4) [1903] 2 K. B. 760.

sustained by the plaintiff in consequence of the public nuisance created by the defendants. That nuisance was the erection of a structure 29 feet in width across the centre of the highway along Burwood Place, a structure erected for the accommodation of members of the borough council to enable them to view the funeral procession of His late Majesty King Edward VII. Unquestionably the erection of this stand in the circumstances of this case was a public nuisance; it is no answer to say that on the morning of May 20 the traffic in that street was by the regulation of the police temporarily stopped. The stand was erected on the day or the night before that, and from that moment it constituted a public nuisance for which the defendants could have been indicted. The jury under the direction of the county court judge found a verdict for the plaintiff, assessing the damages at 90*l*.

Three objections are taken to this verdict. First, it is said that the defendants, the mayor, aldermen, and councillors of the metropolitan borough of Paddington, being a corporation are not liable because the borough council had no legal right to do what they did, and therefore the corporation cannot be sued. This stand was erected in pursuance of a formal resolution of the borough council. To say that, because the borough council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation. If the view of the defendants were correct no company could ever be sued if the directors of the company after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd. The first objection therefore fails, and the defendants are liable to be sued.

The second objection was that the damages recovered by the plaintiff were for obstructing the view from her windows into Edgware Road, and that such damages were not the direct and natural consequence of the defendants' act or of the nuisance which they had created thereby; that is to say, that the damages were too remote. I agree that the law does not recognize a view

1911

CAMPBELL v. PADDINGTON CORPORATION.

Avory J.

or prospect from a house as a right in the nature of an easement which can belong to anybody as of right, and that no period of enjoyment will give a person a right of action against another who on his own land erects a structure or plants trees which obstruct the view or prospect. But that is not this case. This is the case of a person, a corporation in point of fact, not in the exercise of any right, but unlawfully and without any authority, erecting a structure in the public street which seriously interfered with the enjoyment by the plaintiff of her house. That is enough to give the plaintiff a right of action on the case for disturbing her in the enjoyment, use, and occupation of her house; and, moreover, as the wrongful act of the defendants constituted a public nuisance, the plaintiff, having in my opinion established the fact that she has sustained special damage over and above the general public inconvenience, has established a cause of action on this ground also. It is true there does not seem to be any authority directly in point; perhaps the nearest is *Baker* v. *Moore* (1), cited by Gould J. in *Iveson* v. *Moore*. (2) In *Beckett* v. *Midland Ry. Co.* (3) Willes J. dealt with that case and said that it was an authority for this, that in the case of a highway being stopped up, whereby the plaintiff's tenants (possibly tenants for short periods who had the power to do so) were induced to quit, per quod the plaintiff lost the profit of his houses, this damage was special enough; that is to say, there was sufficient special damage to enable the plaintiff to maintain an action for the public nuisance caused. In my view it makes no difference that the tenants were tenants for one day only. The tenants whom the plaintiff lost were tenants who would have occupied and paid rent or its equivalent for one day. She lost these tenants who would have occupied for one day as the direct consequence of this public nuisance, for the jury must be taken to have found that there were persons who would have taken the rooms, but who on seeing the obstruction refrained from taking them. Mr. Ginger claimed to be relieved of his contract, and the plaintiff, as she was bound in equity and morals if not in law to do, relieved him of his obligation and

(1) (1697) 1 Ld. Raym. 491. (2) (1699) 1 Ld. Raym. 486.
(3) L. R. 3 C. P. 82, at p. 99.

lost what she would have received from him and from other persons as well.

The county court judge directed the jury in these words: "The prospect of letting rooms and seats in her house to persons desirous of viewing public processions passing along Edgware Road was an incident attaching to the plaintiff's occupation which appears from the evidence to have a substantial pecuniary value, and if any one deprives her of or injures her prospect of letting rooms for that purpose by erecting an unlawful obstruction in the highway, she is entitled to maintain an action to recover damages in respect of the loss sustained by her." The judge then left to the jury the question whether the plaintiff had in fact suffered loss by this obstruction, and the jury found that she had suffered loss to the amount of 90*l.* It is said that they had no right to take into account the 40*l.* which Ginger had agreed to pay, because the plaintiff was not bound to release him from his contract. In my view it is not necessary to decide whether she was or was not bound. He had taken the rooms with the sole object of having an uninterrupted view, and if the plaintiff could not give him the view I am not prepared to say that she could have recovered from him the amount he had agreed to pay. But be that as it may, the plaintiff was entitled to let her rooms at a profit of 90*l.*, and could have done so had she not been prevented by the wrongful act of the defendants. This appeal must therefore be dismissed.

LUSH J. I am of the same opinion. With regard to the minor contention that the damages were excessive there was ample evidence that the contract between the plaintiff and Ginger was, not that he should have the right to place a chair on a particular spot, but that he should have a clear and uninterrupted view of Edgware Road. There was no contract in writing and the terms of the contract were to be collected from the verbal evidence laid before the jury, and it is impossible to say that there was no evidence that the latter and not the former was the contract. If that was the contract the plaintiff was prevented from performing it through the act of the defendants.

The second contention was that the act of the defendants was

1911

CAMPBELL v. PADDINGTON CORPORATION.

Lush J.

illegal and that therefore the only persons to be sued in respect of it are those individuals who authorized it. In support of this contention the case of *Poulton* v. *London and South Western Ry. Co.* (1) was cited. In that case a stationmaster, being a servant of the defendants, without any instructions or authority from the defendants gave the plaintiff into custody for refusing to pay for the carriage of his horse. The question was whether the act of the stationmaster in giving the plaintiff into custody was within the scope of his employment. It was held that, as the defendants themselves could not lawfully have done the act, it could not be within the scope of their servant's employment to do it. That case was only an illustration of the principle that where the wrongful act is done without the express authority of the corporation, an authority from the corporation to do it cannot be implied if the act is outside the statutory powers of the corporation. That principle has no application to a case where the corporation has resolved to do and has, in the only way in which it can do any act, actually done the thing which is unlawful and which causes the damage complained of. The only matter which raised any doubt in my mind upon this part of the case was that the resolution might appear to have been passed for the personal benefit of the borough councillors themselves; but the answer is that the borough councillors in their individual capacity could have no more jurisdiction over the street in question than any other members of the public. The resolution was the resolution of the corporation, and the act which caused the damage, no matter for whose benefit it was done, was the act of the corporation and not of the individual councillors who resolved to do it. Therefore there are no grounds for saying that the defendants are not responsible for it.

The main point taken on behalf of the defendants was that a right to have a view or prospect from the windows of a house is not a right recognized by the law. No doubt that is true; but the meaning of the proposition is that if a person by an act not otherwise unlawful interferes with the view or prospect from a house, the owner or occupier of the house has no right of action. In the same way, where a person without having acquired a

(1) L. R. 2 Q. B. 534.

right of light enjoys in fact the uninterrupted access of light to his windows, he has no legal right to complain of the conduct of another who by an innocent act obstructs that light. In short, in the one case as in the other the person affected has no right in the sense that he has no easement. But in the present case the act of the defendants, apart from depriving the plaintiff of the view or prospect from her windows, was a wrongful act on independent grounds, and not merely in that it deprived the plaintiff of the view or prospect from her house. The defendants begin with an act wrongful in itself; if such an act is the source and origin of loss to the plaintiff, then, provided the loss is sufficiently closely connected with the wrongful act, it is a loss for which the plaintiff is entitled to redress. There are many cases of wrongful acts causing the loss of the enjoyment of a benefit which could not be enforced, where nevertheless it has been held that damages are recoverable. It is well settled that an action of slander may be brought to recover special damage for loss of the hospitality of friends, yet a person has no right to that hospitality in the sense that he can compel his friends to entertain him or in the sense that they do him a legal wrong by omitting to do so. Again, if a slander causes persons to withhold contributions which they were in the habit of making, an action may be brought although the plaintiff had no legal right to the contributions, in the sense that if they were withheld a right of his would be infringed by the contributors; though as against innocent persons he has no right, yet as against the slanderer the loss of contributions is special damage sufficient to sustain an action. The present case is exactly analogous. The plaintiff was in the enjoyment of a benefit which no doubt she could not enforce; but the moment the defendants by their wrongful act of obstruction deprived the plaintiff of that benefit, they caused her particular damage which was the direct result of their wrongful act. No doubt the damage in order to be recoverable must be the direct result of the wrongful act. But in this case it clearly was. Therefore these facts, the public nuisance, and, as a direct consequence thereof, the loss to the plaintiff of a benefit which she would otherwise have enjoyed, furnish all the materials necessary to constitute a cause of action. In my

1911

CAMPBELL v. PADDINGTON CORPORATION.

opinion there was no misdirection by the county court judge, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *John H. Hortin.*

Solicitors for respondent: *John Hill & Sons.*

W. H. G.

1911

Jan. 18, 19.

THE KING *v.* GARRETT-PEGGE AND OTHERS. *Ex parte* BROWN.

Justice of the Peace—Summary Jurisdiction—Summons—Absence of Seal—Defect in Form—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 1—*Summary Jurisdiction Rules*, 1886, *r.* 31.

By s. 1 of the Summary Jurisdiction Act, 1848, it is provided that no objection shall be taken or allowed to any summons for any alleged defect therein in substance or in form.

Rule 31 of the Summary Jurisdiction Rules, 1886, provides that the forms in the schedule thereto, or forms to the like effect, may be used, with such variations as circumstances may require. The form of a summons given in the schedule indicates a place for a seal by the letters L. S., but gives no more specific direction in the matter.

An information having been laid before a justice of the peace charging a person with an offence punishable under the Summary Jurisdiction Acts, the justice issued an instrument which bore no seal but was in all other respects sufficient as a summons. This instrument was served upon the person charged, who appeared before the justices at the time and place specified therein and objected to the jurisdiction of the Court on the ground that he had not been duly summoned. The justices overruled the objection and convicted the person charged.

A rule nisi having been obtained to quash the conviction:—

Held, that if the absence of the seal was a defect, it was a defect in form within the meaning of s. 1 of the Summary Jurisdiction Act, 1848, and that the conviction was good.

RULES NISI for two writs of certiorari to John William Garrett-Pegge and others, justices of the peace for the county of Buckingham, for the purpose of removing into the King's Bench Division two convictions, each being under the hands and seals of two of the said justices and dated July 20, 1910, whereby one Alfred Brown was convicted for assaulting one Leonard Frank

Gomm and one William Climpson. The ground on which the rules were moved for and granted was that the summonses served upon the said Alfred Brown were not sealed by the justice who signed the same.

From the affidavits filed on behalf of the applicant Alfred Brown and of the justices the following facts appeared:—

On June 16, 1910, an information having been laid against the applicant under s. 42 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), the said applicant was served with an instrument in the following form:—

"In the County of Buckingham.

"Petty Sessional Division of the Chesham Division of the "Hundred of Burnham.

"To Alfred Brown of Chorlesbury in the said county, Farmer.

"Information has been laid before me this day by Leonard Frank Gomm of Chesham in the said county, carpenter, for that you on the eleventh day of June in the year of our Lord one thousand nine hundred and ten at the parish of Hawbridge in the county aforesaid, did unlawfully assault and beat the said Leonard Frank Gomm contrary to the form of the statute in such case made and provided.

"You are therefore hereby summoned to appear before the Court of summary jurisdiction sitting at the Town Hall at Chesham, in the said county of Buckingham, on Wednesday the 6th day of July 1910 at the hour of eleven in the forenoon to answer to the said information.

"Dated the 16th day of June one thousand nine hundred and ten.

"(Signed) James Herbert,
"Justice of the Peace for the said County of Buckingham."

A form similar in all material respects was on the same day served on the applicant summoning him to appear to answer an information charging him with assaulting and beating one William Climpson on and at the same date and place. The evidence as to the proceedings being to all intents and purposes the same in both cases, the case of Leonard Frank Gomm is alone dealt with in this report.

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte.*

On being served with the above instrument the applicant consulted his solicitor, who advised him that, as it was not sealed, it was bad in law as a summons and gave the justices no jurisdiction to hear the information mentioned therein. The applicant thereupon refrained from instructing his solicitor to answer to the information on the merits, but instructed him to inform the justices that the instrument was defective as a summons and bad in law, and to point out that it did not give them any jurisdiction to hear the information or evidence in support thereof, or to adjudicate thereon. He further instructed his solicitor not to appear on his behalf otherwise than as aforesaid.

On July 6, 1910, the solicitor, acting on the instructions of the applicant, appeared before the justices. The name of the applicant was called by the superintendent of police. The solicitor at once rose and informed the justices that he appeared on behalf of the applicant under protest and objected that the instrument purporting to be a summons was bad as a summons on the ground that the seal of the justice who signed it was not affixed thereto, and that therefore the justices had no jurisdiction to hear the evidence in support of or to adjudicate upon the charge; he referred the justices to s. 1 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and to r. 31 of the Summary Jurisdiction Rules, 1886, and the forms in the schedule to the said Rules. (1) He further informed the justices that he did not appear to answer to the charge on the merits.

The justices overruled the objection and proceeded to hear evidence in support of the charge. The applicant entered the Court while the evidence was being given. The justices asked him if he was appearing to the summons and he answered in the negative. The justices offered to adjourn the case in order that a summons signed and sealed might be served upon the applicant, but the solicitor for the applicant refused to consent to that course unless the information were dismissed, a proposal to which the justices would not accede. Neither the applicant nor his solicitor took any further or other part in the proceedings.

(1) See note on p. 894, post.

After the evidence in support of the charge had been called, the justices of their own motion adjourned the case until July 20 in order that the applicant might have a further opportunity of calling evidence. On that date the applicant was present in the petty sessional court-house, sitting in that portion of the Court which is allotted to the public, and being present as a member of the public, and his solicitor was also present on other business. The name of the applicant was called by the superintendent of police, but neither the applicant nor his solicitor made answer. The justices then heard evidence in support of the charge for assaulting William Climpson, after which they convicted the applicant of both charges.

The applicant's solicitor asked the justices to state a case for the opinion of the King's Bench Division, but the justices refused to do this. They stated that the summonses in question had been issued without a seal according to the practice which had existed in the Court of summary jurisdiction for the petty sessional division of the Chesham division of the hundred of Burnham for nineteen years; that summonses for offences triable under the Summary Jurisdiction Acts issued from that Court had never had a place for a seal and had never been sealed since the year 1891.

The rules nisi having been obtained as above stated,

Colam, for the justices, shewed cause. The conviction should stand. The offence of assault under s. 42 of the Offences against the Person Act, 1861, is not of such a nature that a formally correct summons is a condition precedent to a conviction. In that respect the present case differs from *Reg.* v. *Hughes* (1), and also from *Pearks, Gunston & Tee* v. *Richardson* (2), where a particular mode of serving the summons was prescribed by statute and that mode had not been adopted. The summons in the present case falls under the general provisions of the Summary Jurisdiction Acts, and particularly under s. 1 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), commonly known as Jervis's Act, and the schedule to that Act as amended by the Summary Jurisdiction Act, 1879 (42 & 43 Vict.

(1) (1879) 4 Q. B. D. 614. (2) [1902] 1 K. B. 91.

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte*.

c. 49), s. 29, and the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 12, and the Summary Jurisdiction Rules, 1886, made under the authority of the two last-mentioned Acts. By s. 32 of the Act of 1848 it was enacted that the forms in the schedule to the Act "or forms to the like effect" should be deemed good, valid, and sufficient in law. The form A in the schedule contained the words "Given under my hand and seal." There is no other indication in the Act that a summons must be under seal, although by s. 3 a warrant to apprehend the defendant, and by s. 14 a conviction, must be under the hand and seal or hands and seals of the justice or justices issuing or drawing up the same. It is not clear, therefore, that even under the Act of 1848 a seal was necessary to the validity of a summons. But since the Summary Jurisdiction Rules, 1886, it is clear that a seal is not necessary. By r. 32 the forms in the schedule to the Act of 1848 were annulled, and by r. 31 the forms in the schedule to the Rules "or forms to the like effect" may be used. In the form of summons there given the words "Given under my hand and seal" do not appear, and the only indication that a seal is necessary or even permissible is to be found in the letters "L. S." at the end of the form. The use of this form is not obligatory; any other form to the like effect may be used. The presence or absence of a seal does not alter the effect of the summons.

Secondly, assuming that the seal of the magistrate issuing a summons is a necessary part of the summons, its absence is a defect in form; and by the second proviso to s. 1 of the Act of 1848 no objection shall be taken or allowed to any summons for any alleged defect therein in substance or in form. It has been held that if a summons alleges two offences, that is a defect in substance within the meaning of this enactment: *Rodgers* v. *Richards* (1); *Bartholomew* v. *Wiseman*. (2) If such a defect can be cured, surely the mere absence of a seal is not irremediable. Moreover, the proviso goes on to say that no objection is to be taken for any variance between the information, complaint, or summons and the evidence adduced on the part of the informant or complainant at the hearing of the information or complaint;

(1) [1892] 1 Q. B. 555. (2) (1891) 56 J. P. 455.

but that, if any such variance shall appear to the justices to be such that the party summoned and appearing has been deceived or misled, it shall be lawful for them upon such terms as they shall think fit to adjourn the hearing of the case to some future day. A variance between the offence charged and the offence proved is a much more serious defect than the defect alleged here. In *Rex* v. *Tabrum* (1) it was held that the absence of a seal was an omission or mistake in the drawing up of a conviction which the Court was empowered to amend by s. 7 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45) (Baines's Act). That the defect, if any, in this summons was a defect in form merely requires no argument.

Thirdly, if the former contentions fail, the conviction was nevertheless good because the applicant appeared in Court and thereby conferred on the justices jurisdiction to hear and determine the matter of the charge: *Reg.* v. *Hughes.* (2) A summons is not necessary; if the defendant is present in Court and hears the charge made against him, that is sufficient: *Rex* v. *Stone* (3); *Reg.* v. *Shaw.* (4)

J. Scholefield, in support of the rules. The seal of the justice issuing a summons is essential to its validity. In Dalton's Country Justice (ed. 1635), ch. 69, p. 165, it is laid down that a justice of the peace may command surety of the peace either by word only, or by writing. By word only, the party being in his presence. But if the party against whom this surety of the peace is demanded be absent, it is otherwise; for a justice of the peace cannot send for any man, or command any man to be arrested, or brought before him, or to be imprisoned, who is not in his presence, by word only, but he must make his warrant or precept in writing. "This precept or warrant then must be made in writing, and under the justice his seale." In the same work, ch. 117, p. 329, it is stated that "also the warrant of the justice of P. should bee under the seale of the said justice, for every Just. of P. (being a judge of record) hath a seale of his office, and when hee maketh a warrant under his seale to the officer, then the officer ought to give credence to the seale, for

(1) (1907) 97 L. T. 551.
(2) 4 Q. B. D. 614.
(3) (1801) 1 East, 639.
(4) (1865) 34 L. J. (M.C.) 169.

1911

REX v. GARRETT-PEGGE.

BROWN, *Ex parte.*

that is his authoritie, per Brudnell (1), 14 H. 8. 16." See also the same work, ed. 1677, ch. 118, pp. 270, 271, where the passage first cited recurs. Shephard's Sure Guide to His Majesty's Justices of the Peace, published 1663, gives precedents for warrants on pp. 275, 276. The precedents conclude with the words "Given under my hand and seal" and then the date.

In Burn's Justice of the Peace and Parish Officer, 3rd ed. (1756), at p. 272, the forms of summons for offences against the excise laws state that they are under the hands and seals of the justices. These forms are repeated in the edition of 1766 at p. 158.

The general form of summons given in Williams's Precedents, 2nd ed. (1808), vol. 1, p. 567, also contains the words "Given under my hand and seal." And in Jervis's Acts by Archbold, 3rd ed. (1851), p. 97, it is stated that "the first quasi-process upon such information and complaint is a summons issued by the justice of the peace before whom such information is laid or complaint made under his hand and seal."

[LORD ALVERSTONE C.J. In Burn's Justice of the Peace, 30th ed. (1869), vol. 1, p. 1128, under the title Conviction, it is said that the summons "should be signed by the justice by whom it is issued (*Rex* v. *Steventon* (2)) and now should be sealed (11 & 12 Vict. c. 43, s. 1)."]

If the seal of the justice was essential at common law the Summary Jurisdiction Acts have done nothing to make it less necessary. The letters "L. S." in the form authorized by the Rules of 1886 make the seal a part of the summons. Then if there be no seal the summons is bad: *Wing* v. *Epsom Urban Council.* (3) In point of law there was no summons.

This was a defect which might no doubt have been cured if the applicant had appeared and answered the charge: *Reg.* v. *Hughes.* (4) He might have appeared and waived the objection. But if a defendant does not waive an objection, as in *Blake* v. *Beech* (5), or if he appears and protests against the jurisdiction,

(1) Chief Justice of the Common Pleas, 1521—1531.
(2) (1802) 2 East, 362.
(3) [1904] 1 K. B. 798.
(4) 4 Q. B. D. 614.
(5) (1876) 1 Ex. D. 320.

as in *Dixon* v. *Wells* (1) and *Pearks, Gunston & Tee* v. *Richardson* (2), then the defect remains uncured and the justices cannot treat it as if it did not exist. The power to adjourn the hearing where there is a variance between the offence charged and the offence proved only applies in case of a defendant "summoned and appearing."

Colam in reply. There was no universal practice as to the sealing of warrants or precepts or other acts of justices of the peace in their official capacity. In Dalton's Country Justice (ed. 1635), ch. 121, p. 347, numerous precedents of warrants are given and it is stated that "the warrants of the justices of peace may be styled and made after divers manners: As 1. First, in the name of the King, and yet the teste may be under the name of the Justice (or Justices) of peace that grant them out. 2. Or they may be stiled and made onely in the names of the justices. 3. Or they may bee made without any such style, and onely under the teste of the just. of peace, or onely subscribed by the just., as followeth"; and then follows a number of precedents bearing no seal or place for a seal. Also in ch. 117, p. 328, under the title Warrants it is said, "Next, their warrant or precept by writing, ought to be under their hand and seale, or under their hand at least." A warrant under which a man is apprehended was always a more important and solemn instrument than a summons which merely brings to the notice of the defendant the matter with which he is charged and directs him as to when and where he is to answer the charge. If a warrant need not be sealed still less need a summons.

LORD ALVERSTONE C.J. It is only necessary to decide one of the points taken, but I desire to say that if this summons had been open to objection I am not satisfied that there was any waiver of that objection by the applicant. The facts are that in compliance with the terms of the instrument a solicitor appeared on behalf of the applicant and took the objection that the instrument was not a proper summons; then for the purposes of this case he disappeared from the proceedings; he had no authority from the applicant to act

(1) (1890) 25 Q. B. D. 249. (2) [1902] 1 K. B. 91.

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte*.

Lord Alverstone C.J.

further or otherwise on his behalf; it is true that he remained in Court, but that was on other business. The applicant himself was absent during part of the hearing of the first charge, which would have been a serious ground of objection to any conviction on that charge. He was present in Court on the adjourned hearing, but only as a spectator, and I am not prepared to hold that the mere presence of a person in Court subjects him to the obligation to answer a charge then and there made against him when the proper formalities have not been observed to bring him before the Court to answer the charge, and when he is not there for the purpose of answering it.

That makes it necessary to deal with the point whether this is or is not a good summons. I do not know how I should have decided that question if there had been no such enactment as s. 1 of the Summary Jurisdiction Act, 1848. The general practice formerly was that a summons should be sealed, and there is much to be said in favour of the view that the old practice should be continued; it was recognized in the form in the schedule to the Act of 1848 which contained the words "Given under my hand and seal" and the letters "L. S."; and then in the later forms authorized in the year 1886, although the words "Given under my hand and seal" have disappeared, the letters "L. S." remain, indicating at the least that the summons may be sealed. But the decision of this case must depend on the view we take of the facts in relation to the proviso to s. 1 of the Act of 1848. That section begins by enacting that in all cases where an information is laid before a justice of the peace that a person has committed an offence, &c., then the justice may issue his summons directed to such person, stating shortly the matter of the information or complaint and requiring him to appear at a certain time and place, &c., to answer the information or complaint, and to be further dealt with according to law. Then follow two provisoes. The first is immaterial. The second provides "that no objection shall be taken or allowed to any . . . . summons for any alleged defect therein in substance or in form ——." I pause there. Was the objection taken in the present case an objection to the summons for an

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte*.

Lord Alverstone C.J.

alleged defect therein in form? I cannot think of any defect more of form and less of essence than the defect objected to in this summons. It has been signed by the justice; the charge was accurately stated; the name and address of the defendant, the place of the offence, and the time and place at which he was to appear were all given. Everything was there except a wafer covering the letters "L. S." Few defects could be more formal. Then in my opinion the effect of the statute is that, whether the defendant appears or not, no objection shall be taken, or if taken shall be allowed, for any alleged defect in form. If such an objection cannot be taken when the defendant is present in Court, neither can it be taken in his absence by the justices themselves with the result of ousting their jurisdiction. When all the essential requisites have been complied with the justices are bound to proceed and hear the summons. This seems to me to be borne out by the later words of the proviso; no objection is to be taken for any variance between the summons and the evidence adduced at the hearing of the information, "but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day." Clearly a variance may be a more serious matter than a mere defect in form. It is said that the power to adjourn where there is such a variance only applies in case of a defendant "so summoned and appearing." In my view that is not so. The words "so summoned and appearing" are inserted because s. 1 contemplates the appearance of the defendant after summons. The case of a defendant who does not appear is dealt with by s. 2, in which case, upon proof of the service of the summons a reasonable time before the time appointed for his appearance, "it shall be lawful for such justice or justices of the peace to proceed ex parte to the hearing of such information or complaint, and to adjudicate thereon, as fully and effectually, to all intents and purposes, as if such party had personally appeared before him or them in obedience to the said summons." In other words, whether the defendant appears or not, the justices in case of a

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte*.

Lord Alverstone C.J.

variance have power to adjourn the hearing if it seems to them that the variance has deceived or misled the defendant. And in my opinion it is their duty to do so and not to refuse jurisdiction. If they may adjourn, it follows that they have jurisdiction. And if a variance is not a defect founding an objection to the jurisdiction, still less is a mere defect in the form of the summons an objection affecting the jurisdiction. It is at the most one on account of which if the justices think it may deceive or mislead the defendant they may adjourn the hearing. I agree that in cases where a summons is a condition precedent to the jurisdiction of the Court of summary jurisdiction, as in *Dixon* v. *Wells* (1), and there is no summons, the justices cannot proceed. That is not the present case. I also agree with the decision of the majority of the Court in *Reg.* v. *Hughes* (2), who held that, notwithstanding there was neither written information nor oath to justify the issue of a warrant, the justices had nevertheless in the circumstances of that case jurisdiction to hear the charge. I would throw no doubt upon the cases which decide that, if the defendant is brought before the Court, notwithstanding that there may be a variance between the offence charged and that established by the evidence, there, subject to the power of the justices to adjourn the hearing in case the variance may deceive or mislead him, he may be convicted of the latter offence. I refer especially to the case of *Reg.* v. *Hughes* (2) and the distinction taken between that case and *Blake* v. *Beech*. (3) The appearance of the defendant in Court in obedience to an informal document may give the justices jurisdiction, but it is another thing to say that his casual presence in Court as a spectator has the same effect.

I do not propose to attempt any definition of that which may constitute a defect in substance as distinguished from a defect in form within the meaning of the proviso to s. 1 of the Summary Jurisdiction Act, 1848, or to indicate the effect of a defect in substance upon the validity of a summons. It is enough for this case to say that the objection relied on by the defendant was an objection for a defect in form within the proviso, and therefore the rules must be discharged.

(1) 25 Q. B. D. 249. (2) 4 Q. B. D. 614.
(3) 1 Ex. D. 320.

1911

REX v. GARRETT-PEGGE.

BROWN, *Ex parte.*

HAMILTON J. I am of the same opinion. The charge of assault is not one for which the Legislature has prescribed any peculiar procedure in the statute constituting the offence, namely, the Offences against the Person Act, 1861. Sect. 42 of that Act does not make the issue of a summons a condition precedent to the jurisdiction of the justices, and so the procedure to be followed is that which is provided by the Summary Jurisdiction Act, 1848, and the subsequent amending Acts. It seems to me that the combined effect of s. 1 of the Act of 1848 and the Rules of 1886 made under s. 29 of the Summary Jurisdiction Act, 1879, and s. 12 of the Summary Jurisdiction Act, 1884, is to make the form prescribed an obligatory form according to which the magistrates are to issue summonses. Sect. 32 of the Act of 1848 provided for the validity of the several forms in the schedule to the Act "or forms to the like effect," but after the passing of the Acts of 1879 and 1884 and the promulgation of the Rules of 1886, those words authorizing forms to the like effect were repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67), nor can I see anything in the saving clauses of that statute to prevent the complete repeal of s. 32 of the Act of 1848. Accordingly by s. 1 of the Act of 1848 and the Rules of 1886 the form of summons, whereby the justices are to bring the matter of the information or complaint before the person complained of, must be a summons in the form prescribed by the Rules of 1886. That form includes the letters "L. S.," signifying the place for a seal, and therefore the Rules impliedly direct that the place is to be occupied by a seal. The form authorized by the Legislature therefore bears a seal, and a summons is not formally correct unless a seal is affixed. What the seal is to be, whether it is to be of wax or wafer or other substance, whether it is to be the seal of the magistrate or some other seal, is not prescribed and is a matter of small importance. A magistrate may have no seal of his own. He is not a corporation obliged to act under seal. But some seal or other is required by the Legislature for reasons which it is unnecessary to inquire into, but which are probably connected with the ancient office of a justice of the peace, a seal being the solemn authentication of his act.

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte*.

Hamilton J.

The summonses served in the present case were summonses bearing no seal and were therefore not in conformity with the directions of the Summary Jurisdiction Acts. What is the consequence of this omission? I should be loth to say anything to support the practice of these justices in not using any seal. It has been laid down in *Ex parte Pain* (1) that it has always been held that matters of form must be as strictly observed in summary convictions as in indictments. Where the Legislature has directed the observance of a particular form, public officials must follow that form, and no amount of practice to the contrary can justify a departure from it. But how is that departure to affect the person served with the informal summons? It is not necessary to say what the effect would be if the question arose under some statute unaffected by any provision equivalent to the proviso in s. 1 of the Summary Jurisdiction Act, 1848. In the present case that proviso applies, and it enacts that "no objection shall be taken or allowed to any . . . . summons for any alleged defect therein in substance or in form." It is said that this enactment implies that there must be a summons, and that if there is no summons at all there can be no defect in it, and the proviso does not apply. I agree. But how can it be said that this is no summons at all when it gives the defendant all the particulars of the charge which he is entitled to have and commands his attendance to answer the information? Then is the absence of a seal a defect in substance or in form? In my opinion it is clearly a defect in form; there could hardly be a more formal defect. The statute provides that a person served with an instrument complained of as a summons is not to take any objection for any alleged defect in form. Consequently the solicitor who appeared for the applicant took an objection which the statute forbade, and there is no reason why the instrument should not be treated as it was treated by the justices, namely, as a summons defective in form. As to the effect of the solicitor being present to take the objection I say nothing except this, that it would be hard to persuade me that a person who appears to object to and protest against the jurisdiction of the

(1) (1826) 5 B. & C. 251.

Court thereby puts himself in a worse position than if he had not appeared at all.

1911

REX v. GARRETT-PEGGE. BROWN, *Ex parte.*

AVORY J. I agree. This is an application for writs of certiorari to quash two convictions for assault on the ground that the justices who heard the cases had no jurisdiction to convict. It is said that they had no jurisdiction because the applicant had not been duly summoned to appear before them. It is admitted that the information had been duly laid under s. 1 of the Summary Jurisdiction Act, 1848, and that thereupon a justice of the peace issued his summons (in fact there were two summonses) to the applicant to appear on a day named to answer the charge. It is admitted that the instrument called a summons was served upon the applicant giving him notice to attend and answer the charge. The applicant, instead of appearing to answer the charge, did what he was quite entitled to do; he instructed a solicitor to appear and take the objection that he had never been duly summoned. I entertain no doubt that if that had been a good objection the appearance by a solicitor for the purpose of objecting did not amount to an appearance by the applicant himself to answer the charge so as to give the justices jurisdiction to proceed in his absence. The objection taken by the solicitor was overruled, and I do not think that the fact that the applicant himself was present in Court during part of the hearing on the first day and during the second day was an appearance by him such as would confer jurisdiction upon the justices. The whole question is whether the objection that the applicant was not duly summoned was a good objection. In my opinion it was not a good objection. I doubt whether any seal is necessary, and for this reason: s. 1 of the Summary Jurisdiction Act, 1848, makes no provision for a summons being under the hand and seal of the justice issuing it. In that respect the provisions as to summonses differ from those as to warrants and convictions. Sect. 3 of the same statute provides for the form of a warrant to apprehend the defendant, which may be issued either when the defendant fails to obey the summons or in a proper case in the first instance, and that section expressly enacts that the warrant shall be under the hand and seal of the justice issuing the same. Then as to a conviction,

1911

REX v. GARRETT-PEGGE. BROWN. *Ex parte.*

AVORY J.

s. 14 of the same Act expressly provides that a conviction drawn up by justices must be drawn up under their hands and seals. There is therefore a distinction in that respect between the provisions as to summonses on the one hand and warrants and convictions on the other. I agree that the form of a summons appended to the Rules of 1886 apparently contemplates a seal, but I do not say that a summons is defective in form even when it bears no seal of any sort or kind.

The ground on which I think that the objection taken in this case on behalf of the defendant was a bad objection is this: Even if the statute does contemplate a summons under seal, it seems to me unarguable that the absence of a seal is other than a defect in form within the meaning of the proviso to s. 1 of the Summary Jurisdiction Act, 1848. The only ground for inferring that a seal is required is that the printed form in the schedule to the Rules of 1886 indicates a place where a summons may or should be sealed. But if the printed form is the only ground for saying that the presence of a seal is necessary, it cannot be said that the absence of a seal is anything other than a defect in form. Such an objection is not to be allowed; it is not even to be taken, that is to say, taken by the defendant. Therefore where a defendant is served with a summons which is defective in form he is not entitled to take objection to the summons on that ground and to stay away. The defendant in the present case chose to take the risk and stay away, and so the justices had power to proceed in his absence, which they did, and to convict him, as they did. There is therefore no ground for setting aside the convictions, and the rules must be discharged.

Rules discharged.

Solicitors for applicant: *W. H. Court & Co., for Hunt, Gamlin & Simpson, Chesham.*

Solicitors for justices: *Ridsdale & Son, for Francis & How, Chesham.*

NOTE.—The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1: "In all cases where an information shall be laid before one or more of Her

Majesty's justices of the peace for any county . . . . that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such justice or justices for which he is liable by law, upon summary conviction for the same before a justice or justices of the peace, to be imprisoned or fined, or otherwise punished, ... then and in every such case it shall be lawful for such justice or justices of the peace to issue his or their summons (A) directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place before the same justice or justices, or before such other justice or justices of the same county . . . . as shall then be there, to answer to the said information or complaint, and to be further dealt with according to law; . . . . Provided also, that no objection shall be taken or allowed to any . . . . summons for any alleged defect therein in substance or in form, or for any variance between such . . . . summons and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day."

Sect. 32 (repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67)): "The several forms in the schedule to this Act contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law."

SCHEDULE.

(A.)

Summons to the defendant upon an information or complaint.

To A. B. of labourer.

Whereas information hath this day been laid [or complaint hath this day been made] before the undersigned [one] of Her Majesty's justices of the peace in and for the said [county] of for that you [here state shortly the matter of the information or complaint]: These are therefore to command you, in Her Majesty's name, to be and appear on at o'clock in the forenoon at before such justices of the peace for the said county as may then be there, to answer to the said information [or complaint], and to be further dealt with according to law.

Given under my hand and seal this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. S.)

SUMMARY JURISDICTION RULES, 1886.

"31. The forms in the schedule hereto, or forms to the like effect, may be used, with such variations as circumstances may require.

"32. The forms in the schedule to the Summary Jurisdiction Act, 1848, ... are hereby annulled."

1911

REX v. GARRETT-PEGGE.

BROWN, *Ex parte.*

SCHEDULE.

PART I.

Forms in Summary Proceedings other than for Civil Debts.

2.

Summons to defendant.

In the [county of . Petty Sessional Division of].

To A. B. of .

Information on oath [or affirmation] has been laid [or complaint has been made] this day by for that you on the day of at in the aforesaid, did .

You are therefore hereby summoned to appear before the Court of Summary Jurisdiction sitting at on day, the day of , at the hour of in the noon, to answer to the said information [or complaint].

Dated the day of one thousand hundred and .

J. P.

Justice of the Peace for the [county] aforesaid. (L. S.)

W. H. G.

1911

Feb. 13.

In re ANDERSON.

Bankruptcy—Domicil—New Zealand Bankruptcy—Personalty in England—Subsequent English Bankruptcy—Title of Official Assignee in New Zealand—Statutory Assignees—Notice—Priorities—New Zealand Statutes, No. 12 *of* 1908 (8 *Edw.* 7), *ss.* 53, 61.

In 1898 a debtor, whose domicil was English and who was entitled to a reversionary interest in personalty in England, was adjudicated bankrupt in New Zealand. In 1904 he was adjudicated bankrupt in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England, and he at once gave notice of his title to the trustees of the fund:—

Held, that the official assignee in New Zealand was entitled, as against the trustee in bankruptcy in England, to the reversionary interest.

In re Davidson's Settlement Trusts, (1873) L. R. 15 Eq. 383, and *In re Lawson's Trusts*, [1896] 1 Ch. 175, followed.

In re Blithman, (1866) L. R. 2 Eq. 23, and *In re Hayward*, [1897] 1 Ch. 905, discussed.

A statutory assignee who first gives notice of his title to the trustees of a fund obtains no priority by so doing over assignees for value, nor even over a prior statutory assignee who may not have given notice.

THIS was an application by the Official Assignee in Bankruptcy of New Zealand, and raised the question as to who was entitled to certain English assets of the debtor in these circumstances.

The debtor was born in England in 1857 of English parents. In 1879 he married and went to New Zealand, and carried on business there with the intention of settling there. In 1895 he came to England with his wife and family to visit his relatives, intending to return to New Zealand in about eighteen months, but he did not in fact return there until 1906. In the meantime, on September 8, 1898, he was adjudicated bankrupt in New Zealand on a creditor's petition, and obtained his discharge in New Zealand in December, 1900. Subsequently, in January, 1904, he was adjudicated bankrupt in England on a creditor's petition, and the official receiver became the trustee, in bankruptcy. In January, 1910, he applied for his discharge in the English bankruptcy, which was granted subject to a two years' suspension. The debtor, at the date of his New Zealand adjudication and also of his English adjudication, was entitled to a reversionary interest in personalty comprised in the marriage settlement of his parents, and this interest was still reversionary. By an oversight he did not disclose this reversionary interest in either bankruptcy, but the official receiver in the English bankruptcy discovered its existence in August, 1909, and at once gave notice to the settlement trustees of the English adjudication, and subsequently arranged to sell it for 140*l.* The official assignee in New Zealand, however, claimed the 140*l.* on the ground that the creditors in New Zealand were still unpaid, and now applied for a declaration that he was entitled, as against the trustee in bankruptcy in England, to whatever interest the bankrupt was on September 8, 1898, entitled to in the property included in the marriage settlement of his parents.

The New Zealand Bankruptcy Act, 1908 (8 Edw. 7), enacts (s. 53) that upon adjudication all the property of the bankrupt, whatsoever and wheresoever situate, shall vest in the official assignee of the Court in which the order of adjudication is made as such official assignee; and (s. 61) that the property of the bankrupt passing to the assignee and divisible amongst his creditors shall comprise (inter alia) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, or acquired by or devolving upon him before his discharge.

1911

ANDERSON, *In re.*

Tindale Davis, for the application. The procedure in bankruptcy in New Zealand is very similar to that in England and is apparently based upon the Bankruptcy Act, 1883. On the evidence the debtor must be taken to have acquired a New Zealand domicil; alternatively, the applicant will contend that the maxim "mobilia sequuntur personam" applies, and there having been a valid adjudication in New Zealand, this reversion vested in the New Zealand assignee. In *In re Davidson's Settlement Trusts* (1) and *In re Lawson's Trusts* (2) it was held that the foreign assignee was entitled to personalty in England. *In re Blithman* (3) and *In re Hayward* (4) may be cited against this application, but they can be distinguished. It is said in *In re Blithman* (3) that the foreign assignee must come here to sue, and the New Zealand assignee is here suing for this reversion, while *In re Hayward* (4) really turned on the construction of a forfeiture clause in a will. The observations of Channell J. in *Dulaney* v. *Merry & Son* (5) support the contention of the applicant. The text-writers are not agreed on the point. In Dicey's Conflict of Laws, 2nd ed., p. 421, and Westlake's Private International Law, 4th ed., p. 163, it is laid down that domicil is the governing factor, but Foote's Private International Jurisprudence, 3rd ed., pp. 326, 327, treats it as settled that an assignment by a foreign bankruptcy passes all the personal property of the bankrupt situate in England, including choses in action.

Hansell, for the trustee in bankruptcy in England. It is clear that the debtor's domicil is English, and therefore the forum of the domicil prevails, and the English Bankruptcy Act being an Imperial Act governs this case. The New Zealand Act has only a territorial operation, and the English Courts will not give effect to it, however wide and inclusive its language may be. The debtor never acquired a New Zealand domicil and this English asset never vested in the New Zealand assignee. *In re Blithman* (3) and *In re Hayward* (4) are in point. In *In re Davidson's Settlement Trusts* (1) and *In re Lawson's Trusts* (2) the debtor submitted to the foreign jurisdiction by presenting his own petition.

(1) L. R. 15 Eq. 383.
(2) [1896] 1 Ch. 175.
(3) L. R. 2 Eq. 23.
(4) [1897] 1 Ch. 905.
(5) [1901] 1 K. B. 536, 540.

Moreover, *In re Blithman* (1) was not cited in *In re Davidson's Settlement Trusts* (2), and *In re Lawson's Trusts* (3) may be explained by the fact that it was the case of an Indian insolvency, and the Indian Insolvency Act was an Imperial Act. In *In re Hayward* (4) Kekewich J. accepts *In re Blithman* (1) as binding upon him, and says (5): "This domicil being English, the adjudication in bankruptcy in New Zealand did not operate to vest in the trustee or assignee property which, if the adjudication had taken place in England, would have been payable to the trustee here." The observations of Fry L.J. in *In re Artola Hermanos* (6) are also in favour of the English trustee. Lastly, this reversion is an equitable interest, and this is a contest between two statutory assignees whose equities are equal, and it is submitted that the assignee who first gives notice of his title to the trustees of the fund obtains priority.

Tindale Davis, in reply, on the question of notice, cited *In re Wallis*. (7)

PHILLIMORE J. This is a contest between the official assignee of the bankrupt under an earlier bankruptcy in New Zealand and the trustee in bankruptcy under a bankruptcy at a later date in England; and it is a little hard, perhaps, upon the trustee in bankruptcy in England that his researches, which have discovered this asset, should prove fruitless for the creditors whom he represents. For the purposes of this case I assume that the bankrupt had an English domicil, and therefore not a domicil in New Zealand, at the time when he was made bankrupt in New Zealand. I also note in passing, without deeming it necessary to draw any conclusion in this case from it, that Sir Robert Phillimore in his Commentaries on International Law (8) suggests that for the purposes of bankruptcy and the claim of an assignee or trustee in bankruptcy, and the weight to be attached to his claim by reason of the bankrupt having been domiciled or not domiciled in the country where he is adjudicated bankrupt,

(1) L. R. 2 Eq. 23.
(2) L. R. 15 Eq. 383.
(3) [1896] 1 Ch. 175.
(4) [1897] 1 Ch. 905.
(5) [1897] 1 Ch. at p. 910.
(6) (1890) 24 Q. B. D. 640, 648.
(7) [1902] 1 K. B. 719.
(8) 3rd ed., vol. iv., p. 616, note *k*.

1911

ANDERSON, *In re.*

Phillimore J.

a commercial domicil may suffice; but again I will assume, without deciding it, that the bankrupt either had not a commercial domicil in New Zealand, or that, if he had, it is not sufficient. In fact, he was made bankrupt in New Zealand, and apparently by the record, though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy. He recognized the adjudication at any rate by applying some time afterwards for his discharge and obtaining it. That may be of some importance, but I am not going to decide the case upon that ground.

Several cases have been cited in the course of the arguments, some of them conflicting and some of them possibly only apparently conflicting. The four cases which have the most bearing on the point are the Chancery cases of *In re Blithman* (1), *In re Davidson's Settlement Trusts* (2), *In re Lawson's Trusts* (3), and *In re Hayward*. (4) Then in *In re Artola Hermanos* (5) there are certain dicta of Fry L.J. which have some importance for the respondent, and in *Dulaney* v. *Merry & Son* (6) there are observations of Channell J. which, as far as they go, help the applicant. Now with regard to these four Chancery cases, *In re Davidson's Settlement Trusts* (2) and *In re Lawson's Trusts* (3) give the title to funds in Court to the foreign official trustee or assignee in bankruptcy though the bankrupt was not domiciled in the country where he was made bankrupt. It is said that *In re Blithman* (1) and *In re Hayward* (4) lead to an opposite conclusion, but both of them are open to distinction, while the two cases which are in favour of the title of the foreign trustee of the bankruptcy are open to no distinction except for the fact, which I think is not of importance, that the bankrupt admitted the jurisdiction. If it is of importance, I think that the bankrupt was in the same position in the case before me. Now, I am not at all certain that the whole difficulty may not be solved by a more careful analysis of Lord Romilly's decision in *In re Blithman*. (1) There the debtor had been made bankrupt abroad, and a reversionary interest to which he was entitled fell into possession shortly before his death. The trustees of the fund paid it into Court, and a petition for payment out was

(1) L. R. 2 Eq. 23.
(2) L. R. 15 Eq. 383.
(3) [1896] 1 Ch. 175.
(4) [1897] 1 Ch. 905.
(5) 24 Q. B. D. 640, 648.
(6) [1901] 1 K. B. 536.

presented by his legal personal representative. All that Lord Romilly decided was that he must order the money to be paid out to the legal personal representative; that the official assignees of the bankrupt abroad had not that clean and perfect title which entitled them to receive the money out of Court, or which deprived the legal personal representative of the right to receive the money and satisfy prior incumbrances, if there were any, paying at any rate her costs and testamentary expenses and duties before the balance was taken by the foreign assignees in bankruptcy. The judgment carefully avoids deciding that the balance will not go to the foreign assignees in bankruptcy; and in *In re Hayward* (1) Kekewich J., deciding on the construction of a forfeiture clause in a will, held that there had been no forfeiture of the life interest of a debtor domiciled in England who had been adjudicated bankrupt in New Zealand. It is quite true that Kekewich J. seems to think that *In re Blithman* (2) goes further than I have suggested that it does, but if *In re Blithman* (2) only goes as far as I have suggested it does, the judgment of Kekewich J. would, I think, be right. A man who is prevented from incumbering his interest can nevertheless, if the assurance by which it is created is sufficiently carefully drawn, bind himself to deal with the interest after he has received it. It would require a very carefully drawn assurance for that purpose, but I conceive it could be done, and if the man is entitled as against the trustees to receive the money, as in the case of *In re Blithman* (2) the personal representative of the man was held entitled to receive the money, no forfeiture will attach, though, in each of these cases, all, or at any rate all subject to charges, of the money must ultimately go over to the foreign official trustee.

There is a passage in Sir Robert Phillimore's Commentaries in which he refers to Story's way of dealing with the position taken by the Courts of the United States with regard to foreign bankruptcies. (3) It indicates, I think, the sort of consideration that may be applied to these cases. Continental jurists would have no difficulty in understanding that which it

(1) [1897] 1 Ch. 905. (2) L. R. 2 Eq. 23.

(3) 3rd ed., vol. iv., pp. 621, 622.

1911

ANDERSON, *In re.*

Phillimore J.

is a little difficult to express in terms of English law; they know cases of foreign judgments which require in their language homologation by the native Court before they can have their full effect. Something of the same kind may apply in the case of all foreign bankruptcies, or at any rate of foreign bankruptcies where the debtor is not domiciled in the country where he is made bankrupt. The title is not as perfect, or at any rate as direct, as it would be in the case of an English bankruptcy, and on that ground it may be that *In re Blithman* (1) and *In re Hayward* (2) are rightly decided. If not, then they conflict with *In re Davidson's Settlement Trusts* (3) and *In re Lawson's Trusts* (4), and I prefer the latter decisions. Speaking of *In re Lawson's Trusts* (4), I do not forget Mr. Hansell's observation that in that case the Indian Insolvency Act was an Imperial Act, and therefore might be said to bind English assets directly, but this point does not appear to have been either brought to the notice of the Court or relied upon by the Court in the judgment, and the ratio decidendi of *In re Lawson's Trusts* (4) follows *In re Davidson's Settlement Trusts.* (3) Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in *In re Davidson's Settlement Trusts* (3) and *In re Lawson's Trusts.* (4) Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate, subject, of course, to the class of rules, to which Channell J. refers in *Dulaney* v. *Merry & Son* (5), which govern the transfer of personal property in particular instances. In the present case, if the New Zealand bankruptcy passed as

(1) L. R. 2 Eq. 23.
(2) [1897] 1 Ch. 905.
(3) L. R. 15 Eq. 383.
(4) [1896] 1 Ch. 175.
(5) [1901] 1 K. B. 536, 541.

against the debtor all his movable property wherever situate, it passed it equally against all persons claiming under later titles from him, such as an executor, an incumbrancer, an assignee for value, or even an official trustee or assignee in bankruptcy. Therefore this equitable reversion with which I have to deal had ceased to be the bankrupt's, and was no longer part of his assets when the second bankruptcy supervened. Therefore it did not pass to the trustee in the second bankruptcy.

I would like, before I leave this question, to point out that in *In re Artola Hermanos* (1), and cases of that kind, the Court deals, perhaps not quite logically but very sensibly and practically, with cases of concurrent or contemporaneous bankruptcies without much regard as to which bankruptcy was by a few days the earlier of the two. Where both bankruptcies are running, the estate has to be got in. And, at any rate, for the purpose of colligenda bona, it may be quite proper to have two bankruptcies running, one in this country and another in some foreign country. In those cases the Court by upholding the title of the trustee in the English bankruptcy does not mean, as Lord Coleridge clearly pointed out, to decide the ultimate right to the assets. It merely gives a title ad colligenda bona.

Another point urged by Mr. Hansell was that the English trustee was the first to perfect his title by giving notice to the trustees of this property of the statutory assignment to him of the bankrupt's equitable reversion. I think, however, the answer to that is conclusive, and is indicated in and supported by *In re Wallis*. (2) The trustee in bankruptcy only takes what the bankrupt has to give him. If the bankrupt has incumbered his estate he takes it subject to equities. If the bankrupt has passed away a portion of his estate, he only gets the rest; if he has passed it all away, he gets none. If this reversionary interest had not been required in the first bankruptcy, it might be that the trustee in the second bankruptcy would get it. But this is not a case of two separate incumbrancers or assignees for value. It is not like it in principle or in reason. I imagine that the reason why a prior incumbrancer of an equitable estate who has not given notice is postponed to a posterior incumbrancer turns

(1) 24 Q. B. D. 640, 646. (2) [1902] 1 K. B. 719.

1911

ANDERSON, *In re.*

Phillimore J.

largely upon the ground of the laches of number one and on the fact that his laches has made it possible for number two to think that he has got a property which he has not got, and to believe that there is an equitable estate unincumbered which can be assigned to him, whereas in fact it has been incumbered by a previous incumbrancer. To remedy that the Court fastens upon the laches of the first incumbrancer and says that not having given notice he is, pro tanto at any rate, postponed to the man who has been deceived by the fact that he has not given notice. This reason does not exist when one is dealing with statutory assignees, such as trustees and assignees in bankruptcy, who get only that which the bankrupt has to give them. Therefore the fact that the English trustee in bankruptcy perfected his title by giving notice to the trustees of this reversion does not give him the right to it in priority to the New Zealand assignee in bankruptcy, and I give judgment for the declaration asked for. I understand that the costs have been agreed.

Solicitors: *Neve, Beck & Kirby; Tarry, Sherlock & King.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1911

LURCOTT *v.* WAKELY & WHEELER.

Feb. 16, 17.

Landlord and Tenant—Repairs—Lessee's Covenant—"Keep in thorough repair and good condition"—Old Building — Natural Decay — Dangerous Structure Notice—Rebuilding—Liability of Lessee.

A lease of a house in London contained a covenant by the lessee to substantially repair and keep in thorough repair and good condition the demised premises and at the end or sooner determination of the term to deliver up the same to the lessors so repaired and kept. Subsequently the reversion expectant on the lease was assigned to the plaintiff and the lease to the defendants. Shortly before the expiration of the term the London County Council served a notice on the owner and occupiers requiring them to take down the front external wall of the house to the level of the ground floor as being a dangerous structure, and the plaintiff called upon the defendants to comply with this notice, which they failed to do. After the expiration of the term, the plaintiff, in compliance with a demolition order of a police magistrate, took down the wall to the level of the ground floor, and then, in compliance with a further notice of the London County Council, took down the remainder of the wall and rebuilt it in accordance with modern requirements. The house was very old and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it:—

Held, that the defendants were liable under the covenant to recoup the plaintiff the cost of taking down and rebuilding the wall.

The extent of a tenant's obligation under repairing covenants in a lease considered.

Lister v. *Lane*, [1893] 2 Q. B. 212, and *Torrens* v. *Walker*, [1906] 2 Ch. 166, distinguished.

APPEAL from a decision of a Divisional Court (Darling and Bucknill JJ.).

By an indenture of lease, dated May 18, 1881, and made between Louisa Garle, George Smith, and Edward Vaughan Thompson of the first part, the said George Smith and Mary Ann his wife of the second part, all of which said parties were therein called "the lessors," and Benjamin William Pratt George, therein called "the lessee," of the third part, a house numbered 64, Hatton Garden, together with the workshop and appurtenances thereto belonging, was demised to the lessee for a term of twenty-eight years from March 25, 1881, and the lessee, for himself, his heirs,

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

executors, and administrators, covenanted with the lessors, their and each of their heirs and assigns, that he, the said lessee, his executors, administrators, or assigns, would (among other things) from time to time during the said term at his and their own proper costs well and substantially repair, paint, glaze, cleanse, and keep in thorough repair and good condition all the said premises thereby demised, with the appurtenances thereto belonging, and the said premises being so repaired and kept would at the end or sooner determination of the term peaceably yield up to the lessors, their heirs or assigns.

The plaintiff was the assignee of the reversion expectant on this lease, and the defendants were the assignees of the lease. The defendants were manufacturing silversmiths, and they carried on their business at the demised premises.

On February 11, 1909, the London County Council gave notice in writing to the owner and occupiers of the premises under the London Building Act, 1894, and the amending Act of 1898, that the premises had been certified by the district surveyor to be in a dangerous state, and requiring them forthwith to take down the (eastern) external wall to the level of the ground floor.

On February 15, 1909, the plaintiff required the defendants to comply with this notice before March 25, 1909, the date of the expiration of the lease, and then to deliver up to him the premises in a proper state of repair, but upon the expiration of the lease the defendants gave up possession of the premises without having complied with this notice.

In compliance with a demolition order made on May 4, 1909, by a police magistrate under the London Building Act, 1894, the plaintiff took down the wall in question to the level of the ground floor, and subsequently, in compliance with a notice given by the district surveyor on June 11, 1909, under s. 208 of the London Building Act, 1894, he pulled down the remainder of the wall and rebuilt it with concrete foundations and damp courses in accordance with the requirements of the Act. The total cost of these operations was 256*l.* 4*s.* 6*d.*

The plaintiff by this action claimed (amongst other things) to recover this sum from the defendants under the covenants in the lease.

The defendants by their defence disputed their liability to pay this sum, upon the ground that the dangerous condition of the premises was not due to any default of theirs, but was due to the fact that the premises, and in particular the wall in question, were worn out by age and were not originally constructed to endure longer than they had, and could not at any material time have been repaired.

The action was referred to an official referee.

The evidence shewed that the house was at least 200 years old. It had a frontage to Hatton Garden of 24 feet. It was one of a row of houses and was bounded on the north by No. 63, Hatton Garden, and on the south by No. 65. It had originally a garden at the back, but in comparatively recent times, apparently about forty years ago, a workshop or factory was built over the garden, and the walls of this workshop or factory were bonded into the walls of the house. The depth of the house from front to back was 40 feet, but the depth of the house and factory together was 100 feet. The plaintiff sought to prove that the dangerous condition of the premises was due to the vibration produced by the working of the defendants' machinery in the factory, but this was negatived by the official referee.

The official referee found that the condition of the wall was caused by old age and lapse of time, and not by vibration, and that from what was discovered as to the condition of the wall when being pulled down it could not have been repaired without rebuilding it, and he then dealt with the authorities. Referring to *Proudfoot* v. *Hart* (1) and to the opinion expressed by Lord Esher that if a floor became rotten a tenant under a covenant to keep in tenantable repair was bound to put down a new floor, he was of opinion that what Lord Esher said as to the floor applied equally to a wall, and that he was bound by that authority, whether it was good law or bad law. He then discussed *Lister* v. *Lane* (2), *Wright* v. *Lawson* (3), and *Torrens* v. *Walker* (4), and concluded as follows: "The circumstances of all those cases

(1) (1890) 25 Q. B. D. 42.
(2) [1893] 2 Q. B. 212.
(3) (1903) 19 Times L. R. 203, 510; [1903] W. N. 108.
(4) [1906] 2 Ch. 166.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

seem to me distinguishable from the one before me. The doing of the work claimed by the landlord in those cases involved, not a repair or rebuilding of a worn out portion such as a wall or floor, but a rebuilding of the whole house, which would have given the landlord a new house different from that demised, or, as in *Wright* v. *Lawson* (1), a new bay window of a totally different character. In this case it is clear that the whole house does not require rebuilding; the wall can be rebuilt and has been rebuilt, and the old tie plates and binders have been retained, and the case appears to me exactly like that of the new floor mentioned by Lord Esher. Could this wall have been patched or repaired? I find on the facts (although there is a difference of opinion as to that) from what was discovered afterwards that it could not have been patched or repaired, and therefore it could only be rebuilt, and that the defendants were bound to rebuild it. They are liable for the cost of rebuilding it. As to the requirements of the London County Council for rebuilding the wall below the ground, in my opinion, the defendants, as they were bound to rebuild the wall in accordance with the Building Acts and to satisfy the requirements of the London County Council, are therefore liable for the whole of the 256*l.* 4*s.* 6*d.*"

The defendants appealed. The Divisional Court affirmed the decision of the official referee.

Darling J. adopted the statement of the law contained in the summing up of Tindal C.J. in *Gutteridge* v. *Munyard* (2) in preference to the statements of later judges, but he thought that the question must always be one of degree. It was settled law that, if the whole house decayed by the lapse of time, the landlord was not entitled to call on the tenant to build him a new house, but it was also settled law that, if a small portion of the house decayed by the lapse of time, the landlord was entitled to call on the tenant to replace it under a covenant to repair. He thought that the wall in this case came within what the tenant might be legitimately called upon to renew, and that therefore the official referee was right in the conclusion at which he had arrived.

(1) 19 Times L. R. 203, 510; [1903] W. N. 108.
(2) (1834) 1 Moo. & R. 334.

Bucknill J., in concurring, said that the rebuilding of this wall did not alter the character or nature of the house, and that therefore the defendants were liable on their covenant.

The defendants appealed.

Ernest Pollock, K.C., and *A. M. Latter*, for the appellants. This appeal raises an important question as to the extent of a tenant's liability under a covenant to repair. Here the official referee has found that the dangerous condition of the wall was due to old age and that it could not have been repaired without rebuilding it. The question is whether the appellants are bound by the covenants in their lease to rebuild it. The authorities shew that repair does not mean renewal. The law as to the operation and effect of a covenant to repair in the case of an old building is thus stated by Tindal C.J. in *Gutteridge* v. *Munyard* (1): "It is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord." That principle has been applied in *Lister* v. *Lane* (2), *Torrens* v. *Walker* (3), and *Wright* v. *Lawson*. (4)

[COZENS-HARDY M.R. There is a remarkable discrepancy between the reports in *Gutteridge* v. *Munyard* (1), and the language in 7 Carrington & Payne is materially different.]

The principle is stated by Lord Esher in *Lister* v. *Lane* (2) in equally wide terms. But it has been objected, and this view has been adopted by the official referee and the Divisional Court, that that principle only applies where the whole subject-matter is worn out. What is meant by the whole subject-matter? Does it mean the whole subject-matter of the demise or the whole structure? Suppose a demise of ten houses, must they all be worn out, in order that the principle should apply? But suppose it means the whole structure, nothing decays

(1) 1 Moo. & R. 334; 7 C. & P. 129.
(2) [1893] 2 Q. B. 212.
(3) [1906] 2 Ch. 166.
(4) 19 Times L. R. 203, 510.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

uniformly throughout, and there must be some point short of the total collapse of the whole at which it can be said that the decay is the result of old age and the loss must fall on the landlord. Whatever be the meaning of the supposed qualification, it is not supported by the authorities. In *Lister* v. *Lane* (1) the house was only an insignificant part of the whole demise. In *Torrens* v. *Walker* (2) and *Wright* v. *Lawson* (3) a part only of the whole structure required rebuilding. In this case, as in *Torrens* v. *Walker* (2), which was also a case of rebuilding a wall, the wall—and it was here the only external wall of the house—was an essential part of the fabric, and its dangerous condition was the result of old age, and therefore the principle of *Gutteridge* v. *Munyard* (4) applies. That principle is that where old age has brought a thing to the end of its natural life the tenant is not bound under his covenant to repair to give back to the landlord at the end of the term a new and different thing. No doubt, as Tindal C.J. observed, the tenant is bound by seasonable applications of labour to keep the demised property as nearly as possible in the same condition as when it was demised, and that has been done in this case, but his obligation does not extend beyond that. *Proudfoot* v. *Hart* (5) is distinguishable because there the breach, which it is for the landlord to prove,—*Soward* v. *Leggatt* (6)—was admitted, and the Court was addressing itself to the quantum of damages; and *Gutteridge* v. *Munyard* (4) was not there cited. If *Proudfoot* v. *Hart* (5) stands for all the propositions contended for by the reversioner there would be no limit to the effect of these covenants; but in construing a covenant to repair regard must be had to the age and the class of the demised property, and this limitation is always contemplated as between landlord and tenant; otherwise a covenant to repair would import an obligation to rejuvenate, which is contrary to the authorities.

English Harrison, K.C., and *C. E. Dyer*, for the respondent. The question is whether this case falls within *Torrens* v.

(1) [1893] 2 Q. B. 212.
(2) [1906] 2 Ch. 166.
(3) 19 Times L. R. 203, 510; [1903] W. N. 108.
(4) 1 Moo. & R. 334; 7 C. & P. 129.
(5) 25 Q. B. D. 42.
(6) (1836) 7 C. & P. 613.

Walker (1) or whether it falls within the general principle that a man who enters into a covenant to repair is bound to perform it. The principle established by the authorities is that where the house as a whole, or the subject-matter of the covenant as a whole, has by lapse of time fallen into such a condition that it is necessary to rebuild it, the covenant to repair does not apply, but that principle does not extend to a case where only a subsidiary portion of the whole requires rebuilding. In *Torrens* v. *Walker* (1) the covenant was by the lessor to repair the outside of the demised premises. There the house was situated at the corner of two streets forming an acute angle and substantially the whole of the outside of the demised premises required rebuilding. Here the wall which was to be rebuilt formed only a subsidiary part of the whole. It is a question of degree in each case. Further, this is not a mere covenant to repair, but is a covenant to repair and keep in thorough repair and good condition, and to deliver up the premises so repaired and kept. The strength of this case lies in the language of the covenant. *Gutteridge* v. *Munyard* (2) was a nisi prius case, and there is a material difference between the two reports, but Tindal C.J. was there dealing with the case of a building as a whole, and, assuming that the language of his summing up is correctly reported in 1 Moody and Robinson, no exception need be taken to that language as applied to the facts of that case. *Proudfoot* v. *Hart* (3) shews that the renewal of a subsidiary part is covered by the covenant to repair, and the principle of that case applies here.

A. M. Latter in reply. No argument can be founded on the language of the covenant in this case because the covenant in *Lister* v. *Lane* (4) was equally wide, and Lord Esher there says: "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant."

COZENS-HARDY M.R. Notwithstanding the very able arguments which have been addressed to us on behalf of the appellants I

(1) [1906] 2 Ch. 166.
(2) 1 Moo. & R. 334; 7 C. & P. 129.
(3) 25 Q. B. D. 42.
(4) [1893] 2 Q. B. 212.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Cozens-Hardy M.R.

feel no doubt that the decision of the Divisional Court was perfectly right. [The Master of the Rolls stated the facts, and continued.] The question is whether the appellants, the lessees, are entitled to say that the destruction of the wall in question was due to the effect of time and the elements and not to any negligence on their part, and that, therefore, they are not liable to make it good. Against that it is said that the covenants to repair in this lease are very wide and that in many cases repair necessarily involves, not repair strictly so called, but renewal. If an earthenware pipe breaks, you can only repair it by renewing it. Or again, if window frames become rotten and decayed, you cannot repair them except by renewing; and many other instances might be given.

Our attention has been called to a number of authorities some of which contain expressions which taken apart from the context in which they were used seem to me to be far too wide. I refer particularly to the summing up of Tindal C.J. in *Gutteridge* v. *Munyard* (1), and I pass it by with the remark that that was a nisi prius case and that there are two reports of what the Chief Justice said, or of a portion of what he said, in his summing up, and that those reports differ materially. I think it is not fair to the memory of that very learned and very able judge to hold him bound, or to suggest that his successors are bound, by the literal meaning of every word he is reported to have used in one of those reports. I certainly am not prepared to assent to the view that "what the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord." That is obviously too wide. If he only meant to say that, given an old house which in the course of the term, though still a habitable house, is rendered worse by mere lapse of time and the effects of wind and weather, the loss falls on the landlord, I should not object to the statement; but if it is to be made use of as Mr. Latter sought to make use of it, as meaning that the tenant is not liable for anything which can be said to be due to the lapse of time and the elements,

(1) 1 Moo. & R. 334; 7 C. & P. 129.

I respectfully do not assent to it, and it seems to me to be plainly inconsistent with the subsequent authorities. Then it is said that there are authorities, of which *Torrens* v. *Walker* (1) before Warrington J. is perhaps the leading case, which shew that under a covenant to repair there may be such a change of circumstances that the covenantor is not liable, on the ground that what he is required to do cannot fairly be called repairs at all, and that it involves giving an entirely new subject-matter. When I look at the facts in *Torrens* v. *Walker* (1), when I see that that was a covenant by the landlord simply to repair the outside of the premises, and when I see that the outside walls in question in that case, which were two sides of a triangle, were in such a condition that they could not be repaired and had to be pulled down from top to bottom, I think that that decision was quite right on the facts, and that the change of circumstances in that case was one which could not have been in the contemplation of the parties when the covenant was entered into, and that the covenant must be construed with reference to that limitation. The same thing is true of *Lister* v. *Lane* (2), where a house, which was rather an old house, was built upon what is called a timber cill and really had no foundation. The timber was put on the top of 17 feet of mud. That timber had rotted. The house could not be repaired. Nothing could be done but to remove it, to pull it down, or to underpin it to a depth of 17 feet, and to build some brick or other structure from the gravel or chalk up to the house. It was there held by the Court of Appeal, and I see no reason to quarrel with their decision, that the change of circumstances which had arisen could not have been in the contemplation of the parties and that it would not be reasonable to construe the covenant to repair as applicable to that change of circumstances. But then when I come to what I should have thought was everyday experience in cases of this kind, when I come to consider what is to happen when by reason of the elements acting on an old building, say, a chimney stack is blown down, is it possible for the tenant to say he is not liable to put that up because the collapse was due merely to age and

(1) [1906] 2 Ch. 166. (2) [1893] 2 Q. B. 212.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Cozens-Hardy M.R.

the elements? I am astonished to hear that such a contention can be raised. So, if a tenant under a repairing lease finds that a floor has become so rotten that it cannot be patched up, that it is in such a condition that it cannot bear the weight of human beings or of furniture upon it, can it be said that the tenant is exempt from the liability of replacing that floor, and repairing it in the only way in which it can be repaired in order to make the house habitable, merely because the state of the floor is due to time and the elements? I am entirely unable to follow that argument. *Proudfoot* v. *Hart* (1) seems to lay down a perfectly sound and intelligible proposition on this point, namely, that in such a case it is the duty of the tenant, if he cannot patch up the floor so as to make it a floor, to replace that which is no longer a floor by something which is a floor.

That being so, it seems to me that we are driven to ask in this particular case, and in every case of this kind, Is what has happened of such a nature that it can fairly be said that the character of the subject-matter of the demise, or part of the demise, in question has been changed? Is it something which goes to the whole, or substantially the whole, or is it simply an injury to a portion, a subsidiary portion, to use Buckley L.J.'s phrase, of the demised property? In this case the view taken by the official referee and the Divisional Court is the view which commends itself to me, that this portion of the wall, 24 feet in front, is merely a subsidiary portion of the demised premises, the restoration of this wall leaving the rest of the building, which goes back more than 100 feet, untouched. The restoration of this wall will not change the character or nature of the building, and I am unable to say that the question differs in any way from that which we should have had to consider if by reason of the elements and lapse of time, say, some rafters in the roof had become rotten, and a corner of the roof gave way so that the water came in. It seems to me that we should be narrowing in a most dangerous way the limit and extent of these covenants if we did not hold that the defendants were liable under covenants framed as these

(1) 25 Q. B. D. 42.

are to make good the cost of repairing this wall in the only sense in which it can be repaired, namely, by rebuilding it according to the requirements of the county council. In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. This case, which has been very well argued, has raised a question of general public interest, and has entailed reference to a large number of authorities. But, speaking for myself, I do not think it offers any difficulty if we observe closely the nature of the obligations which the defendants took upon themselves, and then consider whether they have performed those obligations. The obligations take the form of covenants in a lease, and it is needless to say that the law requires a man who has entered into a covenant to keep it. But he has only to keep it as properly construed, and there can be no doubt that the proper rule of construction is for the Court to give to the words of the covenant their proper legal signification as applied to the subject-matter to which the covenant refers. Now the covenant here, so far as it is necessary for us to deal with it, may be said to be triple. It is that the lessee will repair and keep in thorough repair and good condition. There is also a subsequent covenant that he will render up in that state the premises demised, but it is not necessary to deal with this further covenant. Speaking for myself, I think it is our duty to give the full meaning to each word of the covenant. It is quite true that there may be pairs of covenants in which the words used are so nearly synonymous in meaning that the scope of the two covenants will greatly overlap. It is even possible that there may be words so absolutely identical in meaning that they may make the two covenants identical. But to my mind the speculation as to the extent to which two covenants would overlap—as to whether there is anything covered by the one which is not covered by the other—is an idle speculation likely to mislead the Court. The sole duty of the Court is to give proper and full effect to each word used, and the question whether this leads to more or less overlapping is of no legal importance. I therefore look upon these as three separate covenants: there is a covenant to repair,

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Fletcher Moulton L.J.

there is a covenant to keep in thorough repair, and there is a covenant to keep in good condition.

But all these three relate to the demised premises, and we must construe them, not in an abstract sense, but as applied to the subject-matter. I will take the one which, to my mind, is the most important in this case, as enabling us to decide it with the greatest certainty and with the least difficulty. That is the covenant to keep the premises in good condition. In the year 1881 these premises were old. Nearly thirty years have passed since then, and there is no doubt that although they had not then suffered from age as much as was the case at the termination of the lease, even then they were old premises. Now what is the meaning of keeping old premises in good condition? I can see no difficulty in deciding the meaning of that. It means that, considering that they are old premises, they must be in good condition as such premises. Let me take a parallel to which I referred in argument. Suppose the case of a ship. A man who covenants to keep the *Mauretania* in good condition must, of course, keep her in the perfection of condition by reason of the fact that she is a vessel of her class and new. Suppose a man covenants for a year to keep in good condition a tramp that has been at sea for fiteeen years, he must perform the covenant just as much as the man who covenanted to keep the *Mauretania* in good condition. But the keeping in good condition in the second case will mean something very different from that which it meant in the former case: it will mean in good condition for a vessel of that age and nature. I desire to state that for my own part I feel no reluctance to give full effect to this consideration in interpreting this covenant. We have to consider what it obliges the lessee to do in the case of an old building. But we must bear in mind that, while the age and the nature of the building can qualify the meaning of the covenant, they never can relieve the lessee from his obligation. If he chooses to undertake to keep in good condition an old house, he is bound to do it, whatever be the means necessary for him to employ in so doing. He can never say "The house was old, so old that it relieved me from my covenant to keep it in good condition." If it was so old that

to keep it in good condition would require replacement of part after part until the whole was replaced—if that was necessary—then, by entering into a covenant that he would do it, he took on his own back the burden of doing it with all that this duty might entail. I have looked at all the cases which have been cited in argument, and, with the exception of one to which I shall presently refer, and which I think can be explained on other grounds, I find no case which even suggests that the age and nature of the structure relieve the covenantor from the duty of maintaining it, if he has undertaken to maintain it.

I have dwelt by preference on the covenant to keep in good condition because it seems to me that it is entirely free from any consideration of the means that have to be employed by the lessee to do the work. The duty undertaken is expressed in clear language and must be performed. Supposing there is a house on a plot of land which is let on a lease for eighty years, and the person who takes the lease undertakes to keep that house in good condition for the eighty years, he cannot assert that it is a house which from the nature of the case would under ordinary circumstances last out twenty years, and therefore that he may let it die at the end of twenty years. He must do all that is necessary to keep that house in good condition for the period for which he has covenanted. But, as I have pointed out, the words "keep in good condition" will have a different meaning according to the nature and age of the house. Now of one thing one can be certain: there is a breach of the covenant if the house no longer remains a house. It is quite clear that, however you qualify the meaning of the keeping of a house "in good condition," it implies that there is a house; and in the present case it seems to me that the defendants' contention is that they were justified in allowing the house to get into a state where it was no longer a house at all because they only covenanted to do repairs. The answer to that contention is this: that they covenanted to keep the house in good condition, besides covenanting to do repairs (a point with which I will deal later on), and therefore they could not plead that they had performed their contract if they allowed the house to come into a condition in which it was no longer habitable as a house.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Fletcher Moulton L.J.

I turn to the facts of the case to see whether the defendants maintained the house and left the house in good condition. It is perfectly obvious that they did not. If a house is in such a condition that it is dangerous to the public, and that a portion of it has to be pulled down and rebuilt at the demand of the authorities on the ground of public safety,—which must be the safety of the people within as well as of the people without—there is a plain breach of the covenant to keep in good condition, and I should be satisfied to decide this case on that ground alone, for in my opinion it would be adequate to support the case for the plaintiff.

Now I will go to the second covenant, which is to keep in thorough repair. Here we get more into the realm of previous decisions by reason of the fact that in some of them it has been treated as a covenant the language of which pointed to the mode in which or the means by which the covenantor is to perform his duty. They leave it, however, a matter on which one is free to express one's opinion, and personally I think that to keep in thorough repair does not in any way confine the duty of the person who is liable under the covenant to the doing of what are ordinarily called repairs. A house is spoken of as being in thorough repair when it is a house to which no repairs have to be done. But it is a description of a state and not of a mode by which that state has been arrived at, and, therefore, in my own mind I draw no wide distinction between keeping in thorough repair and keeping in good condition; they both appear to me to describe the condition of the house. What a surveyor would call in good condition and what a surveyor would call in thorough repair may differ somewhat, but they would be something very like, the one to the other. As I have said, the legal obligation is to keep the house in that state, and I confess that I do not think that from the legal point of view there is much difference between the nature of the two obligations.

I come now to the third covenant, which is to repair. Here there is a duty to perform an operation. No doubt, if you thoroughly repair, it will put the house in a good condition and in a state of thorough repair. But it is plain that the word "repair" refers to the operation to which the defendants bind

themselves to have recourse. For my own part, when the word "repair" is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word "repair" could not be used to cover rebuilding. It would not be apt to describe such an operation. But, so long as the house exists as a structure, the question whether repair means replacement, or, to use the phrase so common in marine cases, substituting new for old, does not seem to me to be at all material. Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old. Therefore you have from time to time as things need repair to put new for old. If you properly repair as you go along the consequence will be that you will always get a house which will be in repair and usable as a house, but you will not get a house that does not suffer from age, nor a house which when old is the same as when it was new. I cannot think that there is any case which lays down that if a person has undertaken throughout a term to repair a house he can ever say that he has no longer any duties because, although he has properly repaired, the house no longer exists. So far, however, as the present case is concerned, that is a point that need not be decided. The two other covenants are quite sufficient to decide the case.

If I am right we need not go to the authorities, because here there is a plain duty and there is a plain breach of it. It is not pretended that this wall, which was part of the demised premises, was in good condition. It is not pretended that it was in thorough repair. Either it got into its ruinous state before the demise of the premises, or it got into that state during the term of the demise, and it is settled law that when a man undertakes to keep a thing in good condition or in thorough repair, and it is not in that condition when the demise commences, the covenant implies that he is to put it in that state as well as to keep it in that state.

I wish next to deal very shortly with the cases to which we have been referred, and which no doubt deal with exceedingly important questions as to the duty of lessees under repairing

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Fletcher Moulton L.J

leases. Let me take first the case of *Proudfoot* v. *Hart*. (1) This case came first before a Divisional Court, consisting of Cave and Mathew JJ. Cave J. laid down certain principles as to the interpretation of a repairing covenant with which, I think, Mathew J. agreed. The covenant there was to keep the said premises in good tenantable repair and to so leave the same at the expiration of the term. Cave J. there said: "All that he" (the tenant) "undertakes to do is to patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up. But, where it has got to such a state that patching up is of no avail—and we all know that things do at last get to that state—then the tenant is not bound to put in anything new, or to pay any proportion of the cost of putting in the new thing, because the old one has become unfit to discharge its duty . . . . It is quite impossible to read through what the learned official referee has said without seeing that he has not adopted that view of the law, because he says, 'I thought that if the paper or paint was thoroughly worn out he must repaint or repaper where done before.' That is exactly the thing he is not bound to do." There is no doubt that Cave J. lent his great authority to an interpretation of these covenants which is entirely in conflict with the interpretation that I should give to them, and the case of *Proudfoot* v. *Hart* (1) would be one on which great reliance might justly be placed by the defendants in the present case if it had not gone to appeal and if the law as there laid down by Cave J. had not been formally overruled. It plainly appears from the judgment of Lord Esher M.R. and the judgment of Lopes L.J., who with him constituted the Court, that both of those judges considered that the obligation was to keep the premises in a state described by the words "good tenantable repair," and that, whether it was by reconstruction or whether it was by that which would be ordinarily termed "repair," the tenant was bound to keep them in that state. The Court clearly laid down that the scope of the covenant was defined by the description of the state in which the house was to be kept. So far did they go in that line that Lopes L.J. drafted, and Lord Esher adopted, a definition of

(1) 25 Q. B. D. 42.

what tenantable repair is. Lord Esher says: "Lopes L.J. has drawn up a definition of the term 'tenantable repair' with which I entirely agree. It is this: '"Good tenantable repair" is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it,'" and he contrasts what it would mean in Grosvenor Square with what it would mean in Spitalfields. The word "repair" there does not refer to the operation of repairing. That is proved by the fact that Lord Esher takes the case of a floor being rotten, and he says that if it is rotten the tenant must put in a new one. "Repair" occurring in the phrase "good tenantable repair" is accepted by the Court as a description of a state, and the interpretation given to the covenant is that, however he does it, the covenantor must keep the premises in that state.

The next case to which reference has been made is *Lister* v. *Lane*. (1) That is a peculiar case, and I do not think that sufficient attention has been paid by the very able counsel who have argued the case for the appellants to what the facts of that case were and to what was the nature of the action. The statement of claim there alleged that the defendant was bound to repair on notice, that notice had been given, and that the repairs claimed by the notice were not done. The defence was that the notice required work to be done which the defendant was not bound to do by the terms of the covenant, and that the premises were repaired and were delivered up in repair in accordance with the covenant. The learned judge at the trial found in favour of the defendant. In other words, he found that the repairs set out in the notice were repairs outside the covenant, and that the defendant had delivered up the premises repaired, so far as his covenant required. That was the issue at the trial and that was the decision. It appears from the excerpts of the evidence given at the trial that the evidence given by the defendant was directed to shew that the house as repaired was a house in a poor condition because it was a house with very uncertain foundations, and that the notice had called upon him to support the house on

(1) [1893] 2 Q. B. 212.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Fletcher Moulton L.J.

foundations of a totally different type from that which it had at the time of the demise. The Court said that the duty of the defendant was to repair the premises demised and that he was not obliged to give back at the end of the demise a totally different structure merely because the premises demised were at the time of the demise in a very bad state of stability. They were in that state when they were demised and in that state they had to be given up. I can find no evidence that the premises would not stand in the condition in which they were delivered up, or that they were worse than when they had been demised originally, excepting, perhaps, that they had sunk somewhat more, a matter which was due to the nature of the premises. The plaintiff there sought to recover damages by evidence of the following kind: "I think the cause of bulging was the sinking of the foundation. I think the decay would be gradual, and it would get worse from 1890 to 1891. I do not think it would have been profitable to repair it without pulling it down." That last statement (which was one material for the plaintiff's purpose) has nothing whatever to do with the defendant. He had not stipulated to do the best thing for his landlord. What he had stipulated to do was to repair, and the learned judge found that he had repaired in accordance with the covenant. The question therefore was whether he was required to give up totally different premises from those that were demised, or pay the cost of foundations which did not exist in the demised premises that he gave up. In my opinion *Lister* v. *Lane* (1) has no bearing whatever on this case. It certainly contains nothing which says that a covenantor is in any way relieved from the burden of his covenant because it may be that in order to fulfil it he will have to a certain extent to rebuild the premises.

The next case is *Torrens* v. *Walker*. (2) That again is a very peculiar case. It is a case where the lessor had undertaken to keep the outside walls in repair, and it was held—and the learned judge decided in accordance with the authorities—that it was a question of repair on notice. No notice had been given by the lessee to the lessor to repair until after the London County Council had served a notice to pull down,

(1) [1893] 2 Q. B. 212. (2) [1906] 2 Ch. 166.

or practically to pull down, the outside walls, and also a portion of the party wall, or inside wall, which abutted on a neighbour's premises. At the time, therefore, when the notice was given repair in my opinion was not possible. It seems to me, on reading the facts of that case, that the house was practically destroyed. When the house was examined the whole of the outside walls, all the inside wall above the second floor, and probably much that was below the second floor, were in a state of ruin. The lessee's premises started from the first floor. Therefore nearly the whole of the structure, so far as it was demised to the lessee, and probably the whole of it, were in a state of ruin when the notice was given. It was held by the learned judge that the duty did not begin till notice. It may very well be that under those circumstances the lessor could say "You have called upon me to do this, but my duty did not begin till you called on me to do it. You did that at a time when it was impossible for me to perform the operation which I undertook to do." I am not bound to say whether *Torrens* v. *Walker* (1) was rightly decided. It is sufficient to say that considerations arose in that case which do not arise here, and I think that it would not be useful to go out of my way to pronounce whether I approve of that decision or not. I reserve my opinion upon it till the time arrives when the very same case comes up before us. But certainly it differs widely from the present case, and, in my opinion, the present case can be decided on the ordinary principle that a covenantor is required to perform his covenant, if the language of it be clear as construed in relation to the subject-matter.

For these reasons I think that the defendants were bound to renew this wall. If it were necessary to treat this as a question of degree I should say that this was only the repair of an element in the whole of the demised premises; but from my point of view it is not necessary to consider that question, and therefore I do not do so. I am of opinion that the appeal should be dismissed with costs.

BUCKLEY LJ. "Repair" and "renew" are not words expressive of a clear contrast. Repair always involves renewal; renewal

(1) [1906] 2 Ch. 166.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Buckley L.J.

of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace. That has been affirmed by *Lister* v. *Lane* (1) and *Wright* v. *Lawson*. (2) But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole. It is with such limitations as these that the language in the cases which have been cited to us must be read. For instance, in *Gutteridge* v. *Munyard* (3) Tindal C.J. says: "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord." Every decay which is the subject of repair is effected by the operation of the lapse of time and the elements diminishing the value. Decay always results from time and nature. Of course the Chief Justice did not mean his words to be understood as meaning that all decay is to be borne by the landlord. They are words which follow upon a sentence in which he was speaking of a building of a particular character, namely, a very old building, and was negativing the argument that the old building was, under the operation

(1) [1893] 2 Q. B. 212. (2) 19 Times L. R. 203, 510.
(3) 1 Moo. & R. 334.

of a covenant to repair, to be converted into a new one. Lord Esher in *Lister* v. *Lane* (1) says: "If a tenant takes a house which is of such a kind that by its own inherent nature it will in the course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair." Now every house is of such a kind that by its own inherent nature it will in the course of time fall into a particular condition. Lord Esher, of course, did not mean that decay is in every case not within the tenant's covenant to repair. The context shews that he did not mean that. He goes on to say this: "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing." If "repair" be understood in the sense which I suggest, the authorities are not, I think, difficult. In *Gutteridge* v. *Munyard* (2) the building was a very old building, and the finding of the jury under the directions of Tindal C.J. only involved that the tenants had substantially kept the building such as it was in repair, although they had not improved it. *Lister* v. *Lane* (3) and *Wright* v. *Lawson* (4) were cases in which the buildings could not by any repair be brought into their original condition. In *Lister* v. *Lane* (3) the only thing that could be done was, not to replace the old timber platform, but to support the house entirely anew by walls carried down another 17 feet to the subjacent gravel. That would be not repairing such a house as was there in question, namely, a house whose foundations were timbers lying on oozy soil, but providing a new house in the sense that its foundations would be on the gravel. In *Wright* v. *Lawson* (4) the bay window could not be replaced, supported as it must have been before by cantilevers, but could be reproduced only by that which would be a new structure, namely, a bay window supported by vertical supports from the ground. *Proudfoot* v. *Hart* (5) contains, I think, no general principle. It was a question as

(1) [1893] 2 Q. B. at p. 216.
(2) 1 Moo. & R. 334; 7 C. & P. 129.
(3) [1893] 2 Q. B. 212.
(4) 19 Times L. R. 203, 510.
(5) 25 Q. B. D. 42.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Buckley L.J.

to what was performance of a covenant to keep in good tenantable repair. All that Lord Esher says (1) is that if the floor become rotten the tenant must put in a new floor unless he can make the floor good by ordinary repair. The floor was a subsidiary part of the whole. The house could not be occupied if the floor were rotten, and the tenant, to comply with his covenant as to tenantable repair, must either make it good by repair or replace it, for otherwise the house would not be tenantable. *Torrens* v. *Walker* (2) was a case in which the covenant was to keep the outside of the premises in repair. The house was triangular in form at the junction of two streets. The pulling down amounted to a demolition of substantially the whole subject-matter of the covenant. In these circumstances the finding of the learned judge (3) was justified, that repairing the building, or, as I prefer to say, repairing the subject-matter of the covenant, namely, the outside of the premises, was impossible, and that nothing could be done but rebuild. The learned judge found in that case that the act to be done was not one of renewal or replacement of a subsidiary part, but substantially a rebuilding of the whole subject-matter of the covenant. All the cases, to my mind, come only to this, that the question is one of degree, and what we have to look to in the present case is to see whether the official referee in his findings of fact has treated the front wall of this house as being a subsidiary part of a larger structure, or has regarded the necessary operations as amounting to substantially a re-erection of the house. His findings of fact are these. First, he finds that the decay of the front wall is not due to any vibration superinduced by the tenants; he thinks it is caused by old age. That of course is in the appellants' favour. He then finds that the wall could not have been repaired without rebuilding. That again is in the appellants' favour. But then, after discussing the authorities, *Proudfoot* v. *Hart* (4), *Lister* v. *Lane* (5), *Wright* v. *Lawson* (6), and *Torrens* v. *Walker* (2), he goes on to say: "In this case it is clear that the whole house

(1) 25 Q. B. D. at p. 54.
(2) [1906] 2 Ch. 166.
(3) [1906] 2 Ch. at p. 171.
(4) 25 Q. B. D. 42.
(5) [1893] 2 Q. B. 212.
(6) 19 Times L. R. 203, 510.

C. A. 1911

LURCOTT v. WAKELY & WHEELER.

Buckley L.J.

does not require rebuilding. The wall can be rebuilt, and has been rebuilt, and the old tie plates have been retained, and the case appears to me to be exactly like that of the new floor mentioned by Lord Esher." That is a material finding of fact on the part of the referee. He finds that this is not the erection of a new house; it is only repair in the sense that it is restoring to stability and safety a subordinate part of the whole. He likens it to the case where the house requires a new floor; here it requires a new wall. When it has got its new wall it will not be a new house; it will be the old house put into repair in the sense that there has been renewed or replaced a worn out subordinate part of the whole. On that finding of fact it appears to me that the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Wild & Collins.*
Solicitors for respondent: *Letts Brothers.*

H. B. H.

Applied. SLATCHER *v.* GEORGE MENCE SMITH, LTD. [1951] 2 All E.R. 388.

STONE *v.* BURN.

1910 *Oct.* 13.

Merchandise Marks—Trade Description—Application of to Goods—Merchandise Marks Act, 1887 (50 & 51 *Vict.* c. 28), *s.* 5, *sub-ss.* 1, 2.

By s. 5, sub-s. 1, of the Merchandise Marks Act, 1887, "A person shall be deemed to apply a . . . . trade description" (which by s. 3, sub-s. 3, includes any name of a person) "to goods who—(c) encloses . . . . any goods which are sold . . . . in . . . . any covering . . . . to which a . . . . trade description has been applied." Sub-s. 2: "The expression 'covering' includes any . . . . bottle."

The appellant, a bottler of beer, having in the course of his business come into possession of certain bottles belonging to the F. Brewery Company and embossed with that company's name, filled them with beer brewed by Bass & Co., placed Bass & Co.'s labels upon them, and sold the contents as being Bass & Co.'s beer:—

Held, that the appellant had applied a false trade description, namely, the F. Brewery Company's name, to the beer none the less because the presence of the Bass labels on the bottles would prevent any reasonable purchaser from supposing that he was buying anything but Bass's beer.

CASE stated by justices of Swansea.

The appellant was summoned under s. 2, sub-s. 2, of the

1910

STONE v. BURN.

Merchandise Marks Act, 1887, for having sold three bottles of beer and three bottles of stout to which a false name, to wit, the name of the Felinfoel Brewery Company, was applied.

At the hearing the following facts were proved or admitted. The appellant was a bottler of Bass's ale and Guinness's stout, which came to him from the breweries in hogsheads. When the ale or stout had been bottled by the appellant a Bass or a Guinness label was attached to the bottle bearing the words "Bottled by Horatius Stone." In the course of his business as a bottler the appellant had received bottles moulded with the names of other bottlers, and such bottles had been used by him and filled with ale or stout, and a label with the above-named description attached thereto by him. Sometimes it was placed on the plain part of the bottle, and it was so placed because it would adhere better there than on the embossed part. On July 22, 1909, the respondent telephoned to the appellant an order for two dozen bottles of Bass's ale and two dozen bottles of Guinness's stout. The quantity so ordered was subsequently delivered by the appellant. Upon inspection by the respondent it was found that six of the bottles were moulded with the name of the Felinfoel Brewery Company, and each bore one of the labels above referred to. The Felinfoel Brewery Company had not given the appellant any authority to use bottles bearing their name, and no charge was made by them for the bottles when ale and stout contained therein was sold by them. The Felinfoel Brewery Company were members of an association which in May, 1909, issued the following notice:—"Notice to Marine Store Dealers, Bottle Dealers, and others. The Southern Welsh Counties Mineral Water Manufacturers' and Bottlers' Trade Protection Association, Limited, hereby give notice that any person or persons found collecting, detaining, dealing in, or selling any mineral water or ale and stout bottles bearing the registered trade mark or trade description of any of the members of the above association will be liable to proceedings without further warning." But the appellant notwithstanding such notice continued to use bottles with the names of other bottlers embossed thereon. He considered that he had an absolute right to use any other manufacturers' bottles. It was stated that the

custom of bottling Bass's ale into bottles having other brewers' names embossed on them had been the custom of the trade in Swansea for thirty years. There was no evidence that labels affixed to the bottles frequently became or had ever been detached. The Felinfoel Brewery Company only bottled beer or stout of their own manufacture, whereas the beer and stout so sold by the appellant to the respondent was admitted to be Bass's beer and Guinness's stout. The justices found (1.) that the appellant had no authority or right to use bottles belonging to the Felinfoel Brewery Company; (2.) that the name of the Felinfoel Brewery Company on the bottles was calculated to deceive, and that such name was a false name and had been applied to the goods within the meaning of ss. 2 and 3 of the Merchandise Marks Act, 1887; and (3.) that the appellant had not acted innocently. They accordingly convicted the appellant.

Atkin, K.C., and *Sampson*, for the appellant. The name of the Felinfoel Brewery Company had not under the circumstances been applied to the contents of these bottles. No doubt if the beer had been sold without any Bass or Guinness labels, so that the only name appearing on the bottles was that of the Felinfoel Company, that name would have been so applied. But its application was expressly negatived by the affixing of the labels, which directed the purchaser's attention to the fact that the contents purported to be brewed by Bass and Guinness and by nobody else. There cannot be two inconsistent trade descriptions applied to the same goods at the same time; and the description on the labels clearly was so applied, therefore the embossed name was not. No reasonable person could have possibly supposed that in buying the contents of these bottles he was buying anything but Bass's and Guinness's beer. The justices seem to have thought that the case was concluded by *Wood* v. *Burgess* (1); but though the facts there were similar, the present point was not there taken. The only point upon which the opinion of the Court was there asked was whether the mere fact that the respondent had no intention to defraud the purchasers was sufficient to justify the magistrate in finding

(1) (1889) 24 Q. B. D. 162.

1910

STONE v. BURN.

that he had "acted innocently" within the meaning of s. 2, sub-s. 2. The question whether the name embossed on the bottle was applied to the mineral water in it notwithstanding that the bottle bore the respondent's paper label was not discussed. Secondly, the appellant here "acted innocently." In *Christie, Manson & Woods* v. *Cooper* (1) the appellants advertised for sale as Dresden china certain china which was not Dresden, the Dresden marks on it being forgeries. Having been warned before the sale that the genuineness of the china was doubtful they told the bidders that they sold it not as Dresden but "for what it is." Under those circumstances it was held that the magistrate was not precluded from finding that they had acted innocently. If the correction of the original false trade description was sufficient there to support the defence of having "acted innocently" it must equally do so here.

Llewellyn Williams (*Bailhache, K.C.*, with him), for the respondent. The case comes within the express language of s. 5, which says in sub-s. 1 that "A person shall be deemed to apply a . . . . trade description to goods who—(*c*) encloses . . . . any goods which are sold or exposed or had in possession for any purpose of sale . . . . in . . . . any covering . . . . to which a . . . . trade description has been applied"; and by sub-s. 2 "The expression 'covering' includes any . . . . bottle." And it has been held by the Court of Appeal in Ireland in *Thwaites* v. *McEvilly* (2) that a person who sells his own mineral water in a bottle embossed with another manufacturer's name commits an offence against that section which he could not get rid of by placing labels bearing his own name upon the bottles. That concludes the question.

LORD ALVERSTONE C.J. This case raises a difficult point, and it becomes necessary to carefully consider the sections. The appellant was summoned under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, for having sold certain bottles of beer to which a false name was applied. It appears that he, without any intention of doing anything wrong, bottled Bass's beer in bottles belonging to and embossed with the name of the Felinfoel Brewery

(1) [1900] 2 Q. B. 522. (2) [1904] 1 I. R. 310.

1910

STONE v. BURN.

Lord Alverstone C.J.

Company. He placed Bass's labels upon the bottles and sold the contents with those labels upon them as and for Bass's beer. Under those circumstances I should unhesitatingly come to the conclusion that so long as the labels remained upon the bottles no reasonable purchaser could think that he was purchasing the Felinfoel Company's beer. But that does not dispose of the case. For when we look at s. 5 it seems that the Legislature has said that a person who puts one brewer's beer into bottles embossed with another brewer's name commits an offence notwithstanding that before selling it he puts the right label on the bottles. By s. 5, sub-s. 1, "A person shall be deemed to apply a . . . . trade description to goods who—(*c*) encloses any goods which are sold or exposed or had in possession for any purpose of sale . . . . in . . . . any covering . . . . to which a . . . . trade description has been applied," and by sub-s. 2 "The expression 'covering' includes any . . . . bottle." Though there is no evidence here that anybody thought the contents of the bottles were the Felinfoel Company's beer, it is impossible in view of the language of that section to say that the appellant did not apply that company's name to the contents. He clearly enclosed the goods in a covering to which that company's name had been applied. Therefore we cannot say that there was no evidence on which the justices could hold that an offence against the Act had prima face been committed. Then arises the question whether the conviction can be quashed on the ground that the appellant proved that he had acted innocently. I cannot say that the justices ought as a matter of law to have held that the appellant had acted innocently and therefore had committed no offence. Mere ignorance of the provisions of the statute does not amount to innocence for this purpose. The words "acted innocently" point to some misapprehension of fact. And here the appellant did not labour under any mistake of fact, for he did what he did with full knowledge, and claiming that he had a right to do it. I think, therefore, that the appeal must be dismissed.

PICKFORD J. I agree that this conviction must be affirmed, though I think the grounds upon which the justices proceeded

1910

STONE v. BURN.

Pickford J.

were altogether wrong. But upon the facts which were proved the conviction may be supported by reference to a section of the Act which was not cited before them. The appellant was summoned under s. 2, sub-s. 2, which says that "Every person who sells . . . . any goods . . . . to which any . . . . false trade description is applied . . . . shall, unless he proves . . . . (*c*) that he acted innocently," be guilty of an offence. And by s. 3, sub-s. 3, "The provisions of this Act respecting the application of a false trade description to goods . . . . shall extend to the application to goods of any false name or initials of a person . . . . in like manner as if such name or initials were a trade description." What the appellant did was this: he put Bass's beer into bottles stamped with the Felinfoel Company's name and put Bass's labels on the bottles. If in so doing he applied the Felinfoel Company's name to the beer it clearly was a false name. The only question is whether he so applied it. Now, apart from the effect of s. 5, the answer to that question would depend upon whether any one looking at the stamped name and the label together would have thought that it was intended to represent the contents of the bottle as being the Felinfoel Company's beer. The justices came to the conclusion that people would have thought so, and that the bottles were calculated to deceive; but there was no evidence on which they could reasonably come to such a conclusion. To my mind it is difficult to believe that any one buying beer in those bottles would have supposed he was buying anything but Bass's beer. On that point then I think the justices were wrong. But we were referred to s. 5, which provides that "A person shall be deemed to apply a . . . . trade description to goods who—(*c*) encloses . . . . any goods . . . . in . . . . any covering . . . . to which a . . . . trade description has been applied." There is no doubt that the appellant did enclose beer in a covering, that is a bottle, to which a trade description, that is the Felinfoel Company's name, had been applied. Therefore when he sold the beer he sold goods to which a false trade description was applied, and consequently by virtue of s. 5 he committed an offence unless he proved that he acted innocently. Here the justices have found as a fact that he did not so act. Why they so found they do not

1910

STONE v. BURN.

Pickford J.

state. But we cannot interfere with their finding in the absence of evidence (the onus of proof of which lay upon the appellant) on which they ought as a matter of law to have found that he acted innocently. In *Christie, Manson & Woods* v. *Cooper* (1) the Court did indeed quash a conviction on the ground that the appellant had acted innocently and that the magistrate was bound in law so to find. I confess I share the doubts expressed there by Channell J. as to whether the question is one for the Court, or whether the case ought not rather to be remitted to the magistrate for reconsideration. But that case was a very different one from the present.

LORD COLERIDGE J. I agree. The appellant having a bottle stamped with the name of the Felinfoel Company placed in it beer which was not that company's beer. That was prima facie an offence by reason of the provisions of s. 5. The only defence could be that he was acting innocently. But, as was said by Channell J. in *Christie's Case* (1), "the innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament." Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute.

Appeal dismissed.

Solicitor for appellant: *R. Woods, for Andrew & Thompson, Swansea.*

Solicitors for respondent: *W. Webb & Sons, for G. F. Forsdike, Cardiff.*

(1) [1900] 2 Q. B. 522.

J. F. C.

C. A.

1911

Jan. 30, 31; *Feb.* 1; *March* 21.

[IN THE COURT OF APPEAL.]

BIDDELL BROTHERS *v.* E. CLEMENS HORST COMPANY.

Sale of Goods—C. i. f. Contract—"Terms net cash"—Right of Buyer to Inspection before Payment—Payment against Shipping Documents—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18 (*r.* 5), 28, 34.

A contract for the sale of hops to be shipped from the Pacific Coast to this country provided that the buyers should "pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c.i.f. to London, Liverpool, or Hull. Terms net cash." The contract contained no term expressly providing for payment against shipping documents:—

Held (by Vaughan Williams L.J. and Farwell L.J., Kennedy L.J. dissenting), that, on a contract in the above terms, the buyers were not bound to pay for the hops on tender of the shipping documents, but were entitled to refuse payment until, upon the arrival of the hops, they had been given an opportunity for inspection of them.

Decision of Hamilton J., ante, p. 214, reversed.

Appeal from the judgment of Hamilton J. in an action tried by him without a jury.

The action was brought to recover damages for alleged breaches of two contracts, dated respectively October 13, 1904, and December 21, 1904.

The first contract, which was made at Sunderland between the defendants, of San Francisco and London, parties of the first part, and Vaux & Sons, Limited, of the city of Sunderland, parties of the second part, provided that "the parties of the first part agree to sell to the parties of the second part one hundred (100) bales, equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905 to 1912 inclusive.

"The said hops to be shipped to Sunderland.

"The parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull (tare 5 lbs. per bale).

"Terms net cash.

"It is agreed that this contract is severable as to each bale.

"The sellers may consider entire unfulfilled portion of this

contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder or if this contract or any part of it is otherwise violated by the buyers.

"Time of shipment to place of delivery, or delivery at place of delivery, during the months (inclusive) of October to March following the harvest of each year's crop.

"If for any reason the parties of the second part shall be dissatisfied with or object to all or any part of any lot of hops delivered hereunder, the parties of the first part may, within thirty days after receipt of written notice thereof, ship or deliver other choice hops in place of those objected to."

The second contract was between the same parties, and in the same terms, except that it provided for the sale by the defendants to Vaux & Sons, Limited, of fifty bales of British Columbian hops equal to or better than choice Pacific Coast hops of each of the crops of the years 1906 to 1912 inclusive; c. i. f. to London.

Upon August 11, 1908, Vaux & Sons, Limited, assigned for value to the plaintiffs all their rights and benefits under the two contracts, and express notice thereof in writing was given by the plaintiffs to the defendants.

Correspondence passed between the parties as to the shipment of the 150 bales of the 1909 crop, and on January 29, 1910, the defendants wrote to the plaintiffs stating that they were ready to make shipment of the 150 bales of the 1909 crop of the contracted quality, and that "for the invoice price less freight we will value on your good selves at sight with negotiable bills of lading and insurance certificates attached to draft, and if you wish we will also attach certificates of quality of the Merchants' Exchange, San Francisco, or other competent authority to cover the shipment." On February 1 the plaintiffs replied that they were prepared to take delivery on the terms of the contracts, and that it was "in accordance with the universal practice of the trade and the custom adopted by you in your dealings with other purchasers of your hops, and it has also been your custom with our assignors to submit samples, and the samples having been accepted to give delivery in bulk in accordance with the samples; but if you decline to adopt

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

the usual and undoubtedly most convenient course, we can only pay for the hops against delivery and examination of each bale. We cannot fall in with your suggestion of accepting the certificate of quality of the Merchants' Exchange, San Francisco." On February 5 the defendants' solicitors wrote to the plaintiffs' solicitors that the refusal of the plaintiffs to pay for the hops except upon terms which were not in accordance with the contracts was a clear breach of the contracts by the plaintiffs, and, that being so, the defendants would not now ship to the plaintiffs the 150 bales of the 1909 crop, and they reserved all their rights in respect of the breach of contract by the plaintiffs.

Upon March 11, 1910, the plaintiffs issued the writ in this action claiming damages for breach of contract in refusing to ship or deliver the 150 bales of hops. The defence, after stating that the defendants raised no defence with reference to the assignment of the agreements, alleged that, by reason of the plaintiffs' violation of the entire unfulfilled portion of the agreements in refusing to pay for the hops in accordance with the terms of the agreements, the defendants were entitled to refuse to further perform the agreements, and they counterclaimed against the plaintiffs for damages for breach of contract in refusing to take and pay for the 150 bales of hops.

Hamilton J. gave judgment for the defendants as reported ante, p. 214.

1911. Jan. 30, 31, Feb. 1. *Montague Shearman, K.C.*, and *Eustace Hills* (*Leslie Scott, K.C.*, with them), for the plaintiffs. The learned judge below held that, without any such express term as "cash against documents," a c. i. f. contract for the sale of goods necessarily imports that the price of the goods is payable upon tender of the shipping documents, although the buyer has had no opportunity to inspect the goods. There is really no authority for that proposition. In all the cases in which the obligation to pay the price of the goods has been treated as arising upon tender of the shipping documents, such as *Ireland* v. *Livingston* (1) and *Crozier, Stephens & Co.* v. *Auerbach* (2), there were express terms in the contract such as "cash against documents." No such

(1) (1872) L. R. 5 H. L. 395. (2) [1908] 2 K. B. 161.

obligation can be implied from the mere fact that the contract is a c. i. f. contract. The expression "c. i. f." has nothing to do with delivery or payment, but merely imports that the price of the goods is to cover the cost of insurance and the freight, and that the necessary documents must be delivered by the seller to the buyer; it does not import that the buyer is not to have the right to the opportunity for inspection of the goods before paying the price, ordinarily given to a buyer by the common law, and now under s. 34 of the Sale of Goods Act, 1893. The Court cannot read into the contract a term depriving the buyer of that right, unless it arises by necessary implication from the terms of the contract. No such implication arises from the fact that the contract is a c. i. f. contract. In the case of the present contract such an implication is rebutted by the term of the contract which speaks of violation of the contract "by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder," and the following terms which clearly indicate that "delivery" is contemplated as taking place at the place of destination. A c. i. f. contract may contain any stipulation as to time and mode of payment upon which the parties may agree: *Polenghi* v. *Dried Milk Co.* (1) There would be nothing inconsistent with the nature of such a contract if the price should be payable otherwise than by cash against documents. That being so, it is impossible, in the absence of any express stipulation as to time of payment, to imply a term in contravention of the ordinary right of a buyer to an opportunity for inspection of the goods before paying the price. The questions whether the property in the goods passes under a c. i. f. contract on their shipment, and at whose risk they then are, have no necessary connection with the question when the price becomes payable.

J. R. Atkin, K.C., and *George Wallace, K.C.*, for the defendants. It is a necessary implication in the case of a c. i. f. contract for the sale of goods that the price is to be payable against shipping documents. A c. i. f. contract is not a contract by the seller to deliver the goods at the place of destination. His obligations under such a contract are to put the goods on board a ship bound for the place of destination indicated in the contract, to

(1) (1904) 10 Com. Cas. 42.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

effect a contract of affreightment for their carriage to that place and an insurance for the voyage with regard to them, to make out an invoice to the buyer, and then to tender the necessary shipping documents to the buyer. When he has performed those obligations he has performed his contract so far as is necessary to entitle him to payment of the price. The property in the goods passes to the buyer upon their shipment, and the seller does not undertake that they shall arrive at the place of destination at all, or in any particular condition. If they are lost, or suffer sea damage, in the transit, it does not concern the seller. Either such a contract comes within the words "unless otherwise agreed" in s. 28 of the Sale of Goods Act, 1893, or the seller by tendering the necessary shipping documents satisfies the condition named in that section, namely, that the seller shall be "ready and willing to give possession of the goods to the buyer in exchange for the price." The delivery of the documents is to be regarded as a constructive delivery of the goods under such a contract. The provisions of s. 34, sub-s. 2, of the Sale of Goods Act, 1893, do not apply, because the terms of a c. i. f. contract bring it within the words "unless otherwise agreed" at the beginning of the sub-section. By s. 55 of the Sale of Goods Act, 1893, any right, duty, or liability which would otherwise arise under a contract of sale by implication of law may be negatived or varied by agreement. The term "net cash" in a c. i. f. contract must import that payment is to be against documents. If the seller does not contract that the goods shall arrive at the place of destination, or that they shall arrive in any particular condition, he cannot be taken to have contracted that there shall be an opportunity given to the buyer to inspect the goods before payment of the price. It does not follow from the fact that express terms are often inserted in a c. i. f. contract, making the price payable against delivery of the shipping documents, that it is not a necessary implication, in the absence of such terms, that the price should be so payable. The construction contended for by the plaintiffs is inconsistent with the provision with regard to the insurance of the goods, an insurance which is clearly intended to be for the protection of the buyer. The payment of the price

before inspection is quite consistent with the continuance of the buyer's right to reject the goods, if, upon inspection when they arrive, it appears that, when shipped, they were not in accordance with the contract. The vesting of the property in the buyer would be conditional upon the goods turning out, on inspection, to have been in accordance with the contract when shipped. The term of the contract which speaks of "refusal to pay for any hops delivered and accepted hereunder" is only a provision as to what shall entitle the sellers to treat the whole contract as repudiated. It really throws no light upon the question whether the payment for a particular shipment is not due upon tender of the shipping documents. [They cited *Barrow* v. *Myers & Co.* (1); *Parker* v. *Schuller*. (2)]

Eustace Hills, for the plaintiffs, in reply.

Cur. adv. vult.

March 21. The following judgments were read:—

VAUGHAN WILLIAMS L.J. I am going in the first instance to deal with this case quite apart from any difficulties which arise on the construction of the peculiar conditions of this particular contract, and as if the words were simply "the parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs. c. i. f. to London, terms net cash."

It was argued before Hamilton J. on behalf of the defendants that the terms "net cash" in a c. i. f. contract necessarily mean "cash against documents," and that a c. i. f. contract is performed by the vendor shipping goods of the description specified in the contract, effecting a proper insurance thereon, and then tendering to the buyer the documents representing the goods, namely, the indorsed bill of lading, invoice, and policy, and that thereupon the buyer has to pay for the goods whether they have arrived or not. Hamilton J. affirmed the proposition just set forth as to performance of a c. i. f. contract by the seller, but in no way based his conclusion on the assumption that "terms net cash" means "cash against documents," and expressed his opinion that the words "terms net cash" in themselves mean only, in the

(1) (1888) 4 Times L. R. 441. (2) (1901) 17 Times L. R. 299.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Vaughan Williams L.J.

absence of proof of trade custom or trade meaning, no credit and no deduction by way of discount or rebate or otherwise, which the law would have implied.

The judgment of the learned judge is based primarily, not on *Ireland* v. *Livingston* (1) or the opinion of Blackburn J. therein stated, nor indeed upon any other authorities upon the meaning of the terms "cost freight and insurance," but is based upon the proposition that the terms c. i. f. "are now settled and, I hope I may add, well understood." Those are the words of the learned judge, and he goes on to say that it is not and cannot be contended but "that the seller under a c. i. f. contract has first of all to arrange to put on board a ship at the port of shipment goods of the description contained in the contract; secondly to arrange for a contract of affreightment under which they will be delivered at the destination contemplated in the contract; thirdly to arrange for an insurance upon the usual terms current in the trade, available for the benefit of the buyer; to make out an invoice in the manner described by Blackburn J. in *Ireland* v. *Livingston* (2), or in some other manner which will express the same thing; and, finally, he has to tender to the buyer those documents so that the buyer may know what freight he has to pay in order to obtain delivery of the goods, if they are intact, or so that he may recover for the loss of them if they have gone to the bottom." (3)

The plaintiffs contended that, in the absence of words providing for payment against shipping documents, unless they accepted a transfer of the bill of lading, the price was not to be paid until they had had the opportunity of examining the shipment, which could not be done till after the arrival of the ship in this country.

There is no evidence as to the practice or course of business between the parties to the contract of December 21, which was a contract under which the defendants entered into an agreement to sell fifty bales of British Columbia hops, equal to or better than choice brewing Pacific Coast hops, of each of the crops of

(1) L. R. 5 H. L. 395—406.
(2) L. R. 5 H. L. 406.
(3) The Lord Justice cited these words from the report in 16 Com. Cas. 8, 14.

the years 1906 to 1912 inclusive, the said hops to be shipped c. i. f. to Sunderland; but I understood from counsel for the defendants that the policies of insurance were taken out in the name of the defendants, and that the bills of lading were given out by the ship in the name of the defendants; but, as in the first instance I dealt with a c. i. f. contract independently of special clauses in this contract, so I propose to deal with this case independently of jus disponendi, the risk under the policy of insurance, or the retention by the defendants of possession under bill of lading, until indorsed in exchange for the price, and seek only to determine what is the obligation of payment under a c. i. f. contract which does not state when or under what conditions the payment of the price is to be made, and which does not contain a provision that payment of the price is to be made against shipping documents. Such a provision is admittedly a very usual provision, but the mere fact that it is a usual provision does not justify the reading of such a provision into the contract of sale and purchase, but rather leads to an opposite conclusion in a case where you do not find this form of words.

The observations of Martin B. and Parke B., in giving their opinions in answer to questions put to the judges by the House of Lords in *Gibson* v. *Small* (1), indicate the view that, even in the case of a commercial document, the Court generally should not read into it a condition which is not expressed, unless on the basis of a custom or understanding, either proved in evidence or long notoriously prevalent, and adopted and acted upon in Courts of law, in which latter case Courts of law would take judicial notice of it without requiring any averment or proof in the particular case, and act upon it and apply it in precisely the same manner as a rule of law. The case of *Gibson* v. *Small* (1) was an action on a policy, and the question was, whether by the law of England, in a time policy effected on a vessel then at sea, there was an implied condition that the ship should be seaworthy on the day on which the policy was intended to attach. It was held that there was no such implied condition. Martin B., in his answer to questions put by the House of Lords, says (2): "The question, therefore, really is, 'has the existence of such

(1) (1852) 4 H. L. C. 353. (2) 4 H. L. C. 370.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Vaughan Williams L.J.

a condition or warranty been notoriously prevalent amongst persons engaged in the business of marine insurance'; and for the present purpose it must be shown that the Courts of law have adopted and acted upon the principle of it." Parke B. says (1): "The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law, for annexing any condition of this sort to a policy of assurance for time. The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness; . . . . If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract; and that, either by the usage of trade, or by the common law of the land; from the nature of the policy itself, there is no other way in which it can be added. The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable. This is explained in the case of *Hutton* v. *Warren*. (2) But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there is evidence of it. Such a condition may, however, be annexed as a necessary incident by the common law. The simple question is, does the common law annex any such incident? An examination of the authorities, judicial decisions, and dicta, and of text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage policies, or any warranty or condition as to seaworthiness, is annexed to time policies." The examination by Lord Campbell in the House of Lords and by Parke B. in his answer of the grounds on which the Court of Queen's Bench affirmed the existence of an implied warranty of seaworthiness in the case of a time policy from a supposition entertained by the judges of the Queen's Bench of the opinion of all the lawyers in modern

(1) 4 H. L. C. 396, 397. (2) (1836) 1 M. & W. 466, 475.

times, or from the obiter dicta of some judges, shews how little judges ought to imply conditions in written commercial contracts from such materials. The origin of the warranty of seaworthiness in the case of a voyage policy was an implication from the nature of the contract, and in the case of *Gibson* v. *Small* (1) it was sought to argue that a similar implication ought to be made in the case of a time policy. The House of Lords recognized that such a condition might be recognized in the case of a contract, and that it had been so recognized in the case of a voyage policy, but refused to make such an implication in the case of a time policy.

It is said that in the case of a c. i. f. contract an implication ought to be made that payment must be made against tender of shipping documents, and this whether the ship and goods have arrived or not. It is suggested, as one of the reasons why this implication should be made, that the goods under a c. i. f. contract are carried at the risk of the buyer, and must be paid for whether the goods are lost at sea or not, because the policy is taken out on behalf and in the interest of the buyer. I do not think that any such implication ought to be made, seeing that "cash against documents" is a term which is frequently included in a c. i. f. contract by express words, and, moreover, because I do not think that the admitted fact that an object of the c. i. f. policy is to enable the goods at sea to be commercially dealt with before the ship arrives compels the buyer to take advantage of this opportunity, if for any reason he is not disposed to do so.

There is no evidence in the present case of any law merchant or custom which reads such words as "payment to be made against shipping documents," or words to that effect, into the contract. The judgment of Hamilton J. does not rest on any such basis; what he says is that, because it is now well settled and well understood that the meaning of the terms "cost freight and insurance" is that, the seller having tendered the bill of lading, invoice, and policy, which completes the delivery of the goods in accordance with the agreement in the contract, the buyer is bound to pay the price of the goods, against shipping documents, before the arrival of the goods in this country.

(1) 4 H. L. C. 353.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Vaughan Williams L.J.

I gather from the words of the learned judge when dealing with the plaintiffs' case (1), "A judge, at any rate when he takes the commercial list, aspires to be both a man of business and a lawyer, but, if he cannot be both, he must be content to be as nearly a lawyer as he can, and I think the law is as I have laid it down with regard to the plaintiffs' claim," that his decision is based upon his personal knowledge in the Commercial Court. This, of course, is a statement of great weight which must impress every one, but I do not think we ought to allow this to be the basis of a decision between litigants in an action in a case where there is no evidence whatsoever either as to local usage in England or as to such general usage in England or foreign countries as is a condition of the admission and adoption as part of the law merchant of England of any legal proposition outside the common law. Nor do I think that Bowen L.J. in *Sanders* v. *Maclean* (2), when he made the observations which appear on p. 343 of the report, meant that the personal knowledge of an individual judge could suffice for the introduction into the law merchant of England of any proposition outside the common law. The law merchant may no doubt govern even the construction of a written commercial document, but in this case, as indeed in every case, there must be evidence in fact of the commercial usage before there can be admission or adoption of it.

When it is said that mercantile law is acted upon by the Courts without proof of usage, this means after it has in earlier cases been proved and adopted. I am not forgetting that in some cases classic legal authorities have been recognized as sufficient evidence of mercantile usage, especially international usage. But, even then, the authority is in terms recognized as sufficient evidence before the Courts give judgment recognizing the usage; but no such evidence was referred to in this case. It seems clear on the authorities that the law merchant must be proved as a fact in the sense that the mercantile usage, which is recognized as part of the law merchant, must be proved, and the fact must, to use the words of Wilmot J. in *Edie* v. *East India Company* (3), be reiterated. Once thus recognized the usage

(1) 16 Com. Cas. 17.
(2) (1883) 11 Q. B. D. 327, 343.
(3) (1761) 1 W. Bl. 295, 299.

becomes part of the law of England and not a mere local usage or custom. Again Lord Campbell in the House of Lords in *Brandao* v. *Barnett* (1) says that "when a general usage has been judicially ascertained and established it becomes a part of the law merchant, which Courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years. There is no decision or dictum to the contrary, and justice could not be administered if evidence were required to be given toties quoties to support such usages and issue might be joined upon them in each particular case." But in the present case no decision was cited in which the mercantile law relied on had been judicially ascertained and established, and no evidence was given in support of the usage of merchants and shipowners to treat a c. i. f. contract as meaning that cash must be paid against documents whether or not the contract in words makes such a provision. On this point I have only to add that I do not think that the judgment of Kennedy L.J. (then Kennedy J.) in *Polenghi* v. *Dried Milk Co.* (2) is in any way inconsistent with the conclusion I have arrived at. On the contrary, it rather affirms that view.

Having arrived at this conclusion, it is not necessary that I should give judgment on the difficulties of construction which arise in this case, nor that I should deal with the argument that the construction put by Hamilton J. on the c. i. f. contract is inconsistent with the provisions of the Sale of Goods Act, 1893, and in particular s. 28. As to s. 28, I am not satisfied that there is anything in the present contract which excludes its operation.

As to the construction of the contract, I certainly think that the two clauses referred to by Hamilton J., the first of which contains these words: "The sellers may consider entire unfulfilled portion of this contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder," and the second of which contains the words: "Time of shipment to place of delivery, or delivery at place of delivery, during the months (inclusive) of October to March following the harvest of each year's crop," and the third clause, "If for any reason" the buyers "shall be dissatisfied

(1) (1846) 12 Cl. & F. 787, 805. (2) 10 Com. Cas. 42.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Vaughan Williams L.J.

with, or object to all or any part of any lot of hops delivered hereunder," the sellers " may, within thirty days after receipt of written notice thereof, ship or deliver other choice hops in place of those objected to," taken together make it very difficult to construe this c. i. f. contract as containing an implied condition for payment of " cash against documents."

The appeal, therefore, must be allowed, and judgment entered for the plaintiffs. As to the amount, I think we have jurisdiction to send the inquiry as to amount to be dealt with by an official referee. I am not quite certain that there was not some agreement as to the amount. Of course, if there was, there is no necessity for an inquiry before the official referee. (1)

FARWELL L.J. The first question in this case is whether a contract for hops " c. i. f. to London, terms net cash," but without the words " against documents," means that the price is to be paid against documents, or after the buyer has had the opportunity of inspecting the goods. Hamilton J. has held, and I agree with him, that " terms net cash " adds nothing to the contract to pay: it means only " no credit and no deductions by way of discount or otherwise." The neat question, therefore, remains, whether the fact that the contract is c. i. f. is by itself sufficient to import " payment against documents," or, in other words, whether a contract which does not contain those words is to be read as a contract which does contain them.

Now, apart from rectification, with which we are not concerned in this case, there are three ways only in which a provision not expressed in a written document can be added to it. The first is where the words used are elliptical; the second is usage, including in that term the law merchant, whereby, under certain limitations, terms may be added to or phrases may be explained and construed in a written document; and the third is necessary implication as explained in *The Moorcock* (2), and *Hamlyn & Co.* v. *Wood & Co.* (3), where

(1) It was afterwards arranged that the Court should itself assess the amount of damages recoverable by the plaintiffs, which it accordingly did on a subsequent day.

(2) (1889) 14 P. D. 64.

(3) [1891] 2 Q. B. 488, 491.

Lord Esher says: "The Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." The words of the contract here, namely, "The parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London," are obviously elliptical so far as "c. i. f." is concerned, and on construction mean that the 90*s.* is to include cost insurance and freight, which are to be provided by the seller on behalf of the buyer, but they express no time or term of payment: payment is dealt with in the next sentence—"terms net cash"—and here is the natural and usual place to add "against documents" or the like, if the parties so intend. But Hamilton J. himself says that "net cash" does not mean "against documents," and I can find nothing in the whole of the words read together, or in any of them read separately, from which any such meaning can be extracted on any rules of construction known to the law.

It is in my opinion equally impossible to add any term by usage. Usage must be proved by evidence, or must have been so often proved as to be part of the law merchant, and to be the subject of judicial knowledge (see *Gibson* v. *Small* (1)); but here no evidence was tendered, nor was it suggested, that there was any usage or law merchant. It is common ground that in the majority of c. i. f. contracts the words "cash" or "bills" or the like "against documents" are expressly inserted, and this very fact is almost conclusive that there is no usage or law merchant, for usage implies a term outside the written document, and is prima facie negatived by finding an express clause usually inserted in written documents of the class in question. The clauses usually inserted in a particular form of written contract are quite distinct from clauses not so inserted but added by usage or law merchant:

(1) 4 H. L. C. 353.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Farwell L.J.

the usage or law merchant dispenses with the express insertion. The omission from a contract of a clause usually inserted in contracts of that class is evidence of the intention of the parties that such clause shall not apply, not that it shall: nor can the Court infer from the express insertion of a particular clause in most of the contracts of a particular class any usage justifying the addition of such a clause to a contract of that class in which it is not inserted. If Hamilton J. had ruled that there was any usage, so often proved that he had judicial knowledge of its existence, to the effect that a c. i. f. contract always implied "cash against documents," whether so expressed or not, I should probably have deferred to his great knowledge and experience in commercial cases, but he has not done so, nor has counsel suggested that any such usage has ever been proved, and they could hardly be ignorant of its existence, if it had any; in the absence of any such usage the judge cannot mero motu add to the law merchant, as to which Foster J. says in *Edie* v. *East India Dock Co.* (1), "Much has been said about the custom of merchants. But the custom of merchants, or law of merchants, is the law of the kingdom and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs, (which are part of the common law), and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law"; and Wilmot J. says (2), "The custom of merchants is part of the law of England; and Courts of law must take notice of it, as such. There may indeed be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. And even there, the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." Indeed in the Court below the respondents' counsel argued on the construction of the words "net cash," and did not suggest that "c. i. f." could be construed as including "payment against documents." This reticence is important when the question is as to the

(1) (1761) 2 Burr. 1216, 1226. (2) 2 Burr. 1228.

existence of usage—a matter that could hardly be unknown to the counsel of experience who argued this case.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Farwell L.J.

There remains, therefore, only the third ground. At common law the delivery of goods by the seller and acceptance and payment by the buyer are regarded as concurrent acts, the buyer being entitled to a reasonable opportunity for inspection before he accepts and pays. It is thus expressed by Rolfe B. in *Startup* v. *Macdonald* (1): "Now, it may be observed, that in every contract by which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is deliver or to pay, can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another, as having, substantially, performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods, or the money, tendered in order to ascertain that the thing tendered really was what it purported to be. Indeed, without such an opportunity an offer to deliver or pay does not amount to a tender." The general rule, therefore, is payment against inspected goods; and this is simple enough where both parties and the goods are together in the same place. But when goods are shipped from across seas, the contract becomes complicated by the fact that the delivery, although not complete until acceptance, commences on a c. i. f. contract on shipment, and the property passes, subject to certain qualifications not necessary now to consider, when the goods are shipped; if the seller fails to ship, or ships goods not according to contract, the breach by him is committed there and then: *Parker* v. *Schuller* (2); *Crozier, Stephens & Co.* v. *Auerbach.* (3) But the buyer's acceptance and duty to pay is not on shipment. The c. i. f. contract usually provides for

(1) (1843) 6 Man. & G. 593, 610. (2) 17 Times L. R. 299.
(3) [1908] 2 K. B. 161.

C. A.
1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Farwell L.J.

payment against documents, a practice convenient for both parties, as the bill of lading enables financial dealings on the credit of the goods to be carried out before the arrival of the goods; but no one has ever suggested that on a c. i. f. contract, silent as to time of payment, the buyer is bound to pay on shipment of the goods. The result must therefore be that the ordinary rule of law is not displaced, namely, payment against examined goods. It is said that this cannot be so, because under the contract in common form "c. i. f. payment against documents" the buyer has to unload and warehouse the goods at his own expense; whereas the seller would have to bear such expense if he has to afford the buyer an opportunity of inspection before payment can be required. But this is only to state the different consequences flowing from two contracts expressed in different terms: there is no such necessity for any implication as to justify the Court in altering the usual incidence of burdens under a contract silent as to this particular burden; and actual physical necessity is not suggested, and would indeed be disproved by the fact that in this very case such inspection before payment has been given by the sellers in one case at any rate during the existence of this contract. I do not suggest that the conduct of the parties under the contract is admissible as evidence of the construction of the contract; I think that it is not (although it would be so in a suit to rectify on the ground of common error); but it is admissible to shew that there is in fact no such impossibility as to render the contract impossible of performance without the addition of the terms suggested.

In my opinion Lord Blackburn's statement in *Ireland* v. *Livingston* (1) throws no light at all on the question before us, and I cannot follow the reasoning of Hamilton J. in this case on pp. 14 and 15 of the report in 16 Com. Cas. I will assume that as a matter of usage the seller is bound to tender the bill of lading to the buyer when it arrives, and, if the buyer accepts it, he must, of course, pay for the goods on such acceptance, because the delivery of the bill of lading is a symbolical delivery of the goods, and, if the goods are accepted, the right of antecedent (though not of subsequent) inspection before

(1) L. R. 5 H. L. 406.

payment is thereby waived, just as it would be in the case of acceptance of the goods themselves without inspection. But I fail to follow the consequence said by the learned judge to ensue. The duty on A. to tender to B. a document before he can require payment does not impose on B. a duty to accept such document as equivalent to goods, if he has a right to inspect such goods before accepting and paying for them. B. has the option of choosing between two alternative rights: he may accept symbolical delivery or actual delivery, but in the absence of express contract it is at his option, not at the seller's. In the great majority of cases, it suits both buyer and seller better to give and accept symbolical delivery by the bill of lading, and the existence and exercise of this option explain why in cases where the c. i. f. contract does not contain the words "cash against documents," or the like, the contract is in fact often so carried out. But this is no evidence of usage for the buyer to accept in all cases, or, in other words, to waive the option. If the goods were lost at sea, the option would at once cease because inspection would have been rendered impossible, and the buyer would be bound to pay against documents.

Then it is said that *Parker* v. *Schuller* (1) is an authority against the appellants. In my opinion, that case has no bearing on the present. The question there related solely to the duty of the seller and the place where the performance of the contract by him was to be carried out. We are here concerned with the duty of the buyer. No one doubts that the seller's breach of a c. i. f. contract arises on failure to ship, but no one suggests that the buyer's duty to pay arises on such shipment; his duty depends on the terms of the contract, and never came into question in *Parker* v. *Schuller*. (1)

The basis of my judgment is that the buyer has a common law right (now embodied in the Sale of Goods Act) to have inspected goods against payment, and this cannot be taken away from him without some contract expressed or implied, and here I can find neither. In this particular, and very ill-drawn, contract there are words, especially in the clause referring to refusal to pay "for any hops delivered and accepted hereunder," which bear out the

(1) 17 Times L. R. 299.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Farwell L.J.

conclusions at which I have arrived, but I prefer to rest my judgment on the general grounds above stated. It is said that this decision will upset mercantile practice, but I fail to see any difficulty in parties who desire it adding "against documents" to their contracts—a course hitherto adopted in the majority of c. i. f. contracts.

In my opinion the appeal should be allowed and judgment entered for the plaintiffs.

KENNEDY L.J. This is an appeal of the plaintiffs in the action against the judgment of Hamilton J. sitting as a judge without a jury for the trial of commercial cases in the King's Bench Division. The action before him comprised a claim of the plaintiffs for damages for breaches of two contracts, partly typewritten and partly printed, and a counter-claim of the defendants for breaches of the same contracts.

So far as regards the claim of the plaintiffs, which Hamilton J. has dismissed, his judgment was in my opinion right, and but for the contrary opinion of the other members of this Court, from whom I have the misfortune to differ, I should have ventured to think the case a reasonably simple one.

The material terms of the two contracts, with the conflicting contentions of the litigants thereon, are carefully stated by Hamilton J. in the opening portion of his judgment (1), and it is needless for me to repeat them here at length. It is sufficient, in order to make clear the reasoning of my judgment, to summarize the statement of the learned judge. Each of the contracts in question is a contract for the sale of foreign hops of specified quality, to be shipped by the defendants, the sellers, from the Pacific Coast to Sunderland, and to be paid for by the plaintiffs, the purchasers, at the rate of 90*s.* sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull, terms net cash. No point arises, as the learned judge states, upon the question of the calculation of freight being to London, Liverpool, or Hull, while the shipment was to Sunderland. Possibly the explanation of this arrangement is that Messrs. C. Vaux & Sons, Limited, the original purchasers, who assigned their interest under the contracts to the plaintiffs,

(1) [1911] 1 K. B. 214; 16 Com. Cas. 12, 13.

carried on business at Sunderland. Anyhow, the fact is, as it has been treated throughout the argument, immaterial. The dispute between the parties is as to the conditions under which, according to the true interpretation of these contracts, the price is to be paid. The plaintiffs' case is that the price was not to be paid until they had been given an opportunity of inspecting the shipment, which could not be given until after its arrival in this country. The defendants contend that the plaintiffs' obligation was to pay for the hops, whether they arrived or not, against tender of the shipping documents. I agree with Hamilton J., and indeed it was not disputed on the argument before us, that the plaintiffs in the correspondence clearly expressed their intention not to take delivery of the 1909 shipment (which is that to which this litigation is confined) except upon the terms of payment for which they now contend; and, therefore, if they are wrong in that contention, they relieved the defendants from the obligation to tender, and they have themselves broken these contracts so far as regards this particular shipment. Before litigation began, the defendants, for the sake of peace, offered, as a matter of grace, to make the plaintiffs the reasonable and businesslike concession of attaching to the shipping documents certificates of quality of the Merchants' Exchange at San Francisco, or other competent authority. But this offer was rejected by the plaintiffs, and the parties, respectively, are now standing upon their rights, as they allege, under the documents which contain the contracts. The Court, therefore, has in the present case to decide what are the true conditions of the right of the seller to payment under a c. i. f. contract, if that commercial contract is to be performed strictly according to its tenor.

Hamilton J. has unhesitatingly decided in favour of the defendants. In his opinion it was unnecessary to refer to authorities as to the meaning of the terms "cost freight and insurance," because those terms are now well settled and, as he hoped he might add, well understood. But he has given a reasoned judgment to which I can discover no answer in the argument of the appellants' counsel, which was for all practical purposes the same as that which appears from the *Law Reports*

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Kennedy L.J.

to have been put forward by them unsuccessfully in the Court below. But for the differing opinion of Vaughan Williams L.J. and Farwell L.J., which, of course, raises in my mind a doubt of the correctness of my own, I should have been content to adopt that judgment as it stands. But, in the circumstances, and believing as I do that this appeal affects a large and important branch of import business, it is, I think, right that I should deal with the case in my own way, although this will involve a much longer judgment than I should otherwise have thought necessary or justifiable.

The plaintiffs'—that is the appellants'—argument, apart from a reference to certain subordinate and subsidiary printed clauses to which I shall advert after dealing with the main question, hangs upon considerations arising from (*a*) the absence, after the words "net cash," of such words as "against documents," or "in exchange for documents"; (*b*) the provisions of s. 28 and s. 34 of the Sale of Goods Act, 1893, in respect of the buyer's right to have delivery in exchange for the price and to have an opportunity to examine goods tendered for acceptance.

In regard to the wording of the contract, I do not think that the comment that the terms might have been more fully expressed helps one way or the other as to the interpretation of the contract as it stands. All that can be said is that, the condition of payment not being expressly stated except in so far as the words "net cash" negative payment by acceptance and the allowance of deduction or discount, it must be settled by the interpretation of the document according to established principles of mercantile law. If any implication is necessary, the law, as stated by Bowen L.J. in his judgment in *The Moorcock* (1), desires to give such business efficacy to the transaction as must have been intended at all events by both parties, who are business men. This is not a case, as it seems to me, of a contract the terms of which present ambiguity or conflict. There is no contrariety between "cost freight and insurance, net cash" and "cost freight and insurance, net cash against documents." Both the fuller and the shorter form are, I believe, in every-day use: examples of both can be found within the covers of

(1) 14 P. D. 64, 68.

modern law reports (see, for example, *Parker* v. *Schuller* (1) and *Sanders* v. *Maclean* (2)); and, although it is probable, I should think,—and the present litigation certainly vindicates its expediency—that the fuller form is the more common, it has, so far as I am aware, never before this case been suggested that a contract "cost freight and insurance, net cash" or a contract "cost freight and insurance, payment by acceptance" may not imply "against documents" in each case. The well-known passage in the opinion of Lord Blackburn (then Blackburn J.) in *Ireland* v. *Livingston* (3), referred to by Hamilton J., in which a great master of the commercial law stated the course of business in the performance of a cost freight and insurance contract as very usual and well understood, plainly cannot be relied on for the respondents as an actual decision in their favour; for the statement itself is obiter, and the particular contract in that case contained the words "payment by acceptance on receiving shipping documents." But Lord Blackburn's opinion was delivered in the House of Lords forty years ago, and, speaking for myself, I do not recollect hearing it suggested until I listened to the argument of the plaintiffs' counsel in this case that the value of that opinion, as setting forth the relative rights and duties of seller and buyer in the ordinary course of procedure under a c. i. f. contract, wholly depended upon the insertion of "against (or "in exchange for") shipping documents" after the statement of the mode of payment by cash or by acceptance, as the case may be.

Let us, however, leave out of sight altogether for the present all question of usage or judicial recognition of usage. The application of the principles and rules of the common law, now embodied in the Sale of Goods Act, 1893, to the business transaction embodied in the c. i. f. contract appears to me to be decisive of the issue between these parties. Let us see, step by step, how according to those principles and rules the transaction specified in such a c. i. f. contract as that before us is and, I think, must be carried out in order to fulfil its terms.

At the port of shipment—in this case San Francisco—the

(1) 17 Times L. R. 299. (2) 11 Q. B. D. 327.
(3) L. R. 5 H. L. 395.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Kennedy L.J.

vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, 1893, s. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of s. 32 the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is prima facie to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c. i. f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative: see the judgments of Bramwell L.J. and Cotton L.J. in *Mirabita* v. *Imperial Ottoman Bank*. (1) It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee. But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is, according to the express terms of s. 32, only "prima facie deemed to be a delivery of the goods to the buyer"; and under s. 28 of the Sale of Goods Act, as under the common law (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *Macdonald* (2)), a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession. How is such a tender to be made of goods afloat under a c. i. f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal

(1) (1878) 3 Ex. D. 164. (2) 6 Man. & G. 593.

of the purchaser. "A cargo at sea," says Bowen L.J. in *Sanders* v. *Maclean* (1), "while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." The meaning of "delivery" under the Sale of Goods Act is defined by s. 62 to be "voluntary transfer of possession from one person to another." Such delivery, as the learned draftsman of the Act and its editor remarks in his note to this section, may be either actual or constructive: see Chalmers' Sale of Goods Act, 1893, 7th ed. p. 140; and, as Bowen L.J. has pronounced, in the case of seaborne goods, the delivery of the bill of lading operates as a symbolical delivery of goods. But then I understand it to be objected on behalf of the plaintiffs: "Granted that the purchaser might, if he pleased, take this constructive delivery and pay against it the price of the goods; what is there in the 'cost freight and insurance' contract which compels him to do so? Why may he not insist on an option of waiting for a tender of delivery of the goods themselves after having had an opportunity of examining them after their arrival?"

There are, I think, several sufficient answers to such a proposition. In the first place, an option of a time of payment is not

(1) 11 Q. B. D. 327, 341.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Kennedy L.J.

a term which can be inferred, where the contract itself is silent. So far as I am aware, there is no authority for the inference of an option as to times of payment to be found either in the law books or in the Sale of Goods Act. Secondly, if there is a duty on the vendor to tender the bill of lading, there must, it seems to me, be a corresponding duty on the part of the purchaser to pay when such tender is made. Very relevant on this point is the language of Brett L.J. in his judgment in *Sanders* v. *Maclean* (1), which applies to this class of contract the same principle as was expounded by Bowen L.J. in *The Moorcock*.(2) He said: "The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable"; and, if it be the duty implied in the c. i. f. contract, as held by Brett L.J. in that case, that the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, "mercantilely reasonable" that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading, either drawn originally in his favour or indorsed to him, and accompanied in case of loss by the policy of insurance. For thereunder, as the bill of lading with its accompanying documents comes forward by mail, the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or, perhaps, in the case of shipments from a distant port, months, before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to gain under the c. i. f. contract according to the construction which I put upon it.

But, in truth, the duty of the purchasers to pay against the shipping documents, under such a contract as the present, does not need the application of that doctrine of the inference in mercantile contracts that each party will do what is "mercantilely reasonable," for which we have the great authority of Lord Esher. The plaintiffs' assertion of the right under a cost freight and insurance contract to withhold payment until delivery of the

(1) 11 Q. B. D. 327, 337. (2) 14 P. D. 64.

goods themselves, and until after an opportunity of examining them, cannot possibly be effectuated except in one of two ways. Landing and delivery can rightfully be given by the shipowner only to the holder of the bill of lading. Therefore, if the plaintiffs' contention is right, one of two things must happen. Either the seller must surrender to the purchaser the bill of lading, whereunder the delivery can be obtained, without receiving payment, which, as the bill of lading carries with it an absolute power of disposition, is, in the absence of a special agreement in the contract of sale, so unreasonable as to be absurd; or, alternatively, the vendor must himself retain the bill of lading, himself land and take delivery of the goods, and himself store the goods on quay (if the rules of the port permit), or warehouse the goods, for such time as may elapse before the purchaser has an opportunity of examining them. But this involves a manifest violation of the express terms of the contract "90*s.* per 112 lbs. cost freight and insurance." The parties have in terms agreed that for the buyer's benefit the price shall include freight and insurance, and for his benefit nothing beyond freight and insurance. But, if the plaintiffs' contention were to prevail, the vendor must be saddled with the further payment of those charges at the port of discharge which ex necessitate rei would be added to the freight and insurance premium which alone he has by the terms of the contract undertaken to defray.

Finally, let me test the soundness of the plaintiffs' contention that according to the true meaning of this contract their obligation to pay arises only when delivery of the goods has been tendered to them after they have had an opportunity of examination, in this way. Suppose the goods to have been shipped, the bill of lading taken, and the insurance for the benefit of the buyer duly effected by the seller, as expressly stipulated in the contract. Suppose the goods then during the ocean transit to have been lost by the perils of the sea. The vendor tenders the bill of lading, with the insurance policy and the other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed, and at whose risk, covered by the insurance, the goods were at the time of loss. Is it, I ask myself, arguable that the purchaser could be heard to say,

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Kennedy L.J.

"I will not pay because I cannot have delivery of and an examination of the goods"? But it is just this which is necessarily involved in the contention of these plaintiffs. The seller's answer, and I think conclusive answer, is, "You have the bill of lading and the policy of insurance." It is noticeable that in the course of the argument in *Tregelles* v. *Sewell* (1) Martin B. observes, "The purchaser was to have a policy of insurance, which is usually considered as equivalent to the goods," and earlier in the same argument Wilde B. (2) asked, "If the meaning is 'to be delivered at Harburgh,' what necessity is there for insurance?" The contract in that case was a contract in the fuller form, namely, against documents, but it does not seem to me that that affects the value of those observations as to the relative rights of the buyer and seller.

I have only to add as to this, the main question in the present case, a few words in regard to ss. 28 and 34 of the Sale of Goods Act. As I have already said, my own view as to s. 28 is that the section is satisfied by the readiness and willingness of the seller to give possession of the bill of lading. I am, however, far from saying that the view which is suggested in the course of the judgment of Hamilton J., namely, that when the parties have entered into a c. i. f. contract they have "otherwise agreed," is not one which could be supported, as I hold that a similar view is the true view also in regard to s. 34, sub-s. 2. As to s. 34, sub-s. 1, there is no difficulty. No one suggests that the plaintiffs, if they pay against documents, become thereby precluded from rejecting the goods if, on examination after their arrival, they are found to be not goods in accordance with the contract, or from recovering damages for breach of contract if they prefer that course.

So far I have tested the validity of the appellants' contention that under a simple c. i. f. contract the seller is entitled to payment only against delivery of the goods themselves and after examination of the goods, altogether apart from authority, by applying, as I hope, established principles and rules of law to a c. i. f. contract so as to give it in the language of Bowen L.J. such efficacy as must have been intended by the parties to it as business men.

But, in truth, the judgment of the Court of Appeal (A. L.

(1) (1862) 7 H. & N. 574, 579. (2) 7 H. & N. 578.

Smith M.R., Collins L.J., and Romer L.J.) in the case of *Parker* v. *Schuller* (1) cannot, in my judgment, be reconciled with this contention of the present appellants. In *Parker* v. *Schuller* (1) the case came before the Court of Appeal on an appeal from the judge in chambers, who had affirmed an order giving the plaintiffs leave under Order XI., r. 1 (*c*), to issue a writ and serve the defendant to an action in contract, who was a foreigner out of the jurisdiction, with notice of the writ. The validity of the judge's order depended according to the terms of Order XI., r. 1 (*c*), upon the existence of a breach, or alleged breach, within the jurisdiction. The contract was in every essential point identical with the contract in the present case. It was a simple c. i. f. contract, without mention of payment against documents, the goods sold being goods to be shipped from Germany to Liverpool. The goods had not been shipped. The breach alleged by the plaintiffs in the indorsement upon the writ of summons and in the affidavit in support of their application was the non-delivery of the goods themselves to the buyers in Liverpool. The judge in chambers (Farwell J.), who heard the application ex parte in the first instance, and Lawrance J., who affirmed his order, had held that the non-delivery of the goods in Liverpool did, as the plaintiffs contended, constitute a breach of the contract within the jurisdiction. The Court of Appeal reversed their decision, holding that this non-delivery of the goods themselves upon which the plaintiffs relied in their writ and the affidavit in support of their application did not constitute a breach of the c. i. f. contract; and there is, I think, a noteworthy confirmation of the opinion of Hamilton J. that the law on this point has long been treated as well settled in the fact that Mr. Horridge (now Horridge J.), the counsel for the plaintiffs in *Parker* v. *Schuller* (1), expressly declined even to argue the point upon which his clients had obtained their order from the judges appealed from, and upon which the plaintiffs, the appellants in the present case, base their appeal to this Court, but endeavoured to uphold that order upon the ground, not relied upon in the writ or in the affidavit, that under the c. i. f. contract the seller is bound to deliver to the buyer the bill of lading and the policy of insurance with the other

(1) 17 Times L. R. 299.

C. A. 1911

BIDDELL BROTHERS v. E. CLEMENS HORST COMPANY.

Kennedy L.J.

shipping documents (if any), and that their unquestionable failure to do this constituted a breach within the jurisdiction which would justify the grant to his clients of the order for service of notice of the writ which they had obtained. According to the judgment of Hamilton J., and my own also, Mr. Horridge's argument as to the obligation of the seller under a c. i. f. contract not merely to ship the goods at the foreign port, but to deliver the shipping documents to his buyer here, was well founded, and the judgments of the Court of Appeal in *Parker* v. *Schuller* (1) contain nothing in conflict with that view. But all the members of the Court declined to deal with any defence of the order appealed against which rested upon a breach other than that which was put forward in the plaintiffs' writ of summons and affidavit; and, being clearly of opinion that under a c. i. f. contract there was no obligation on the seller to deliver the goods themselves in this country, they allowed the appeal. The case is so important that I think it is my duty to quote one passage from the judgment of the Master of the Rolls at p. 300 of the report in the Times Law Reports: "Upon the appeal the alleged contract to deliver the goods at Liverpool was dropped, the contract being 'c. i. f. Liverpool,' and it was not argued that the contract was to deliver the goods at Liverpool. That was abandoned. The plaintiff therefore was wrong in his application. It was not contended that a c. i. f. contract was a contract to deliver goods in this country." Then, after referring to Mr. Horridge's argument that the contract did bind the seller to deliver the shipping documents, the Master of the Rolls proceeded: "It was enough in the present case to say that that was not the cause of action indorsed on the writ of summons nor the cause of action alleged in the affidavit upon which leave to issue the writ and to serve notice thereof out of the jurisdiction was granted. The claim was for non-delivery of the goods. It was not until the case came into this Court that the plaintiff set up another cause of action. That could not be allowed."

The case of the plaintiffs on the present appeal that the defendants can demand payment only upon delivery of the goods

(1) 17 Times L. R. 299.

logically depends upon the alleged obligation of the defendants to deliver the goods themselves in this country, and we cannot, it appears to me, reverse the judgment of Hamilton J. in this case without holding, as a necessary conclusion, that this Court decided wrongly in *Parker* v. *Schuller* (1) when it held, in regard to a simple c. i. f. contract, essentially identical with the c. i. f. contract in the present case, that it created no such obligation on the part of the seller.

In regard to the subsidiary or supplemental clauses of the contracts in question, from which the plaintiffs' counsel sought, to some slight extent, to draw support for their interpretation of the principal or governing provisions with which I have already dealt, I have really little or nothing to add to that which my brother Hamilton has said in considering this part of the plaintiffs' argument. These clauses are printed clauses, not very clearly expressed, but apparently intended to meet certain possible contingencies which we have not to consider in deciding the present issue. They do not appear to me to throw any useful light upon the construction of the contracts in regard to the conditions of payment. I may add, again referring to *Tregelles* v. *Sewell* (2), that the fact that there is a reference to delivery of goods in a c. i. f. contract was held in that case not sufficient to alter the effect of the c. i. f. terms. There the contract was in its fuller form—"payment upon delivery of bill of lading and policy"—but this does not, I think, affect the principle if the contracts are to be performed strictly according to their tenor. In my judgment, the judgment of Hamilton J. was right, and this appeal, so far as relates to the plaintiffs' claim, should be dismissed.

Appeal allowed.

Solicitors for plaintiffs: *Nicholson, Graham & Jones.*
Solicitors for defendants: *Parker, Garrett & Co.*

(1) 17 Times L. R. 299. (2) 7 H. & N. 574.

E. L.

1911
March 13.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* BATES.

Criminal Law—Prosecution—Requisite Consent of Attorney-General not obtained —Jurisdiction — Conviction — No substantial Miscarriage of Justice — Explosive Substances Act, 1883 (46 & 47 *Vict. c.* 3), *ss.* 2, 7—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

A prisoner was convicted on an indictment charging him with an offence under s. 2 of the Explosive Substances Act, 1883. The consent of the Attorney-General to the preferment of the indictment, which is required by s. 7 of that Act, had not been obtained. The prisoner appealed against the conviction:—

Held, that, the consent of the Attorney-General not having been obtained, there was no jurisdiction to try the indictment, and, that being so, the Court of Criminal Appeal had no power to deal with the case under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, as one in which no substantial miscarriage of justice had occurred, and that the conviction must, therefore, be quashed.

Appeal against conviction.

The appellant was tried at the Leicester Assizes on an indictment which charged him with having unlawfully and maliciously caused by an explosive substance an explosion of a nature likely to endanger life contrary to s. 2 of the Explosive Substances Act, 1883. The appellant was convicted and was sentenced to four months' imprisonment with hard labour.

It was not proved at the trial that the consent of the Attorney-General to the proceedings against the appellant had been obtained as required by s. 7 of the Act (1), and on the hearing of the appeal it was stated by counsel for the Crown that the Attorney-General's consent had in fact not been obtained.

The appellant was not present on the hearing of the appeal and was not represented by counsel.

(1) Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 7: "(1.) If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent of the Attorney-General, except such as the justice may think necessary by remand, or otherwise, to secure the safe custody of such person."

1911

REX v. BATES.

Disney, for the Crown, pointed out that the absence of the Attorney-General's consent was not one of the grounds of appeal stated in the notice of appeal. He referred to *Rex* v. *Waller*. (1)

Bodkin, as amicus curiæ, referred to *Reg.* v. *Fuidge*. (2)

The judgment of the Court (Lord Alverstone C.J., Lawrance and Pickford JJ.) was delivered by

Lord Alverstone C.J. In this case we express no opinion as to the merits of the appeal because we have not heard the facts or the arguments which might have been addressed to us on those facts either by the appellant or by counsel for the Crown. Our attention has been called to the fact that an indictment under s. 2 of the Explosive Substances Act, 1883, was preferred against the appellant without the consent of the Attorney-General having been obtained as is required by s. 7 of the Act. That point is not raised by the appellant in his notice of appeal, but we should have allowed him to raise it if he had been present, and we must deal with it now as if it had in fact been raised. In our opinion the failure to obtain the consent of the Attorney-General deprived the Court of any jurisdiction to try the prisoner on the indictment, and, that being so, the conviction must be quashed. In the case of *Reg.* v. *Fuidge* (2), to which our attention has been called by Mr. Bodkin, an indictment was quashed because the requirements of the Vexatious Indictments Act, 1859, had not been complied with. That case therefore affords a clear analogy to the present case. We cannot deal with this case under the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, as one in which no substantial miscarriage of justice has occurred, for in our opinion that proviso does not apply to cases where there is no jurisdiction to try the prisoner on the charge which has been preferred against him.

Conviction quashed.

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1910] 1 K. B. 364.
(2) (1864) L. & C. 390; 33 L. J. (M.C.) 74.

F. O. R.

C. A.
1911
Feb. 14, 15, 22.

[IN THE COURT OF APPEAL.]

SIMMONS *v.* LIBERAL OPINION LIMITED. *In re* DUNN.

Solicitor—Costs—Liability—Retainer to conduct Defence to an Action—Implied Warranty of Existence of Authority—Non-existing Defendant—Liability of Solicitor personally to pay Plaintiff's Costs.

A solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority.

Appeal from an order of Darling J. which raised the question as to the personal liability of a solicitor for the costs of an action defended by him in the name of a non-existing client. The matter arose out of a political libel action of *Simmons* v. *Liberal Opinion Limited* which resulted in a verdict for the plaintiff for 5000*l*. The material facts were as follows.

In February, 1910, a writ was issued against Liberal Opinion Limited for an alleged libel contained in a newspaper known as the *St. George's and Wapping Progressive Champion*, purporting to be published by the defendant company.

Appearance was entered for Liberal Opinion Limited on March 3, by one A. E. Dunn. The statement of claim was delivered on March 23.

The statement of defence was delivered on April 20, by Dunn as solicitor for the defendant; the defence admitted the publication by the defendant of the words complained of in the statement of claim.

On August 11, an affidavit of documents was made by one Duncan Campbell Lee, who swore that he was the managing director of the defendant company and was duly authorized to make the affidavit, and on the same day an answer to interrogatories for the examination of the defendant company was made by the said D. C. Lee. Each of these documents was prepared by A. E. Dunn.

On November 14 the plaintiff's solicitors wrote to Dunn as

follows: "We have to call your attention to the fact that you have entered an appearance for one of the defendants herein under the name of 'Liberal Opinion Limited.' We issued a writ against this defendant under that description as there is a statement printed on the last page of the *St. George's and Wapping Progressive Champion* to the effect that the paper is published by 'Liberal Opinion Limited.' On searching at Somerset House no such company is apparently in existence and there is no record on the register of newspapers of the *St. George's and Wapping Progressive Champion* and on searching at Stationers' Hall there is no record of the registration of the copyright of such paper. Further, on searching at the British Museum no such paper has been forwarded in accordance with the Act of Parliament. We can only think you were under a misapprehension when you appeared for your client as 'Liberal Opinion Limited.'

"You are doubtless aware that persons using the word 'Limited' without being a limited liability company are liable to considerable penalties. We have to ask you by return of post to inform us what the exact constitution of 'Liberal Opinion' may be, whether it is a partnership, or whether it is a private individual who carries on business under that name. The appearance at present is obviously faulty and must be put right. We have just had our attention called to an affidavit of documents which was sworn by Mr. Duncan Campbell Lee, who describes himself as the managing director of the defendant company 'Liberal Opinion Limited,' which makes the matter still more serious."

On November 15 the following reply was sent by A. E. Dunn to the plaintiff's solicitors:—

"We beg to acknowledge the receipt of your letter of the 14th instant, and while congratulating you on the extended range of your research may we be permitted to suggest a continuance of the same as the best means of solving the problem submitted in your letter."

On November 26, Dunn filed another affidavit in which he described himself as solicitor for the defendant.

On January 18 and 19, 1911, the action was tried. On the

C. A. 1911

SIMMONS v. LIBERAL OPINION LIMITED. DUNN, *In re.*

evening of January 18 Dunn was definitely informed by D. C. Lee that the company had not been actually registered under the Companies Act nor under the Industrial and Provident Societies Act, 1893, though a deposit of 5*l.* had been paid pending the deposit of a final print of the rules with the Registrar of Friendly Societies.

The jury gave a verdict for the plaintiff for 5000*l.*, and judgment for this amount was subsequently entered against "Liberal Opinion Limited." At the conclusion of the trial application was made on behalf of the plaintiff that the solicitors for the defendant should shew cause why they should not be made personally responsible for the plaintiff's costs, on the ground that Liberal Opinion Limited was not a limited company as stated in the pleadings, and therefore that the solicitors had no authority to appear for them or defend the action.

There was evidence that D. C. Lee had instructed Dunn to enter an appearance and defend the action for Liberal Opinion Limited.

Darling J., after hearing Dunn's evidence, thought that he had authority to act for certain persons who carried on business under the style of Liberal Opinion Limited, and therefore it could not be said that he had no clients, and consequently that the application failed.

The plaintiff appealed. The appeal was heard on February 14, 15, and 22.

McCardie, for the appellant. There has been a breach of warranty here by the solicitor that he had authority to act for his supposed client when as a fact he had no client. The principles stated and acted upon in *Yonge* v. *Toynbee* (1) apply: there is no distinction in principle between the case where the agent never had authority and the case where an agent originally had authority but that authority ceased without his knowledge. The solicitor here represented, by entering an appearance and defending the action, that he had authority which in fact he had not, and he is therefore liable on an implied contract that he had authority, whether there

(1) [1910] 1 K. B. 215.

was fraud or not. It is essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims, of representing his client, and the Court in exercising the authority which it possesses over its own officers will proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority. There is jurisdiction to order the solicitor here to pay all the costs of the action which have been thrown away by reason of the appearance entered and the defence raised by Dunn for a non-existing client.

Hoskins v. *Phillips* (1) is a good illustration of the personal liability of a solicitor for costs in a case of this kind. [Cordery on Solicitors, pp. 116 and 117, was also cited.]

[It was also argued that Dunn was personally liable for these costs on the ground of misconduct in not instructing his counsel on the second day of the trial, when he was aware of the fact, that Liberal Opinion Limited had not been registered under the Industrial and Provident Societies Act, 1893, and the case was adjourned that the Court might have the benefit of a statement by the leading counsel for the defendant in the libel action as to what had actually taken place, with the result that the Court was satisfied with the explanation given, and as no judgment was delivered on this point the argument and facts on this part of the case are omitted.]

C. A. Russell, K.C., *Stuart Bevan*, and *Lord Tiverton*, for the solicitor. The facts here are essentially different from any of the cases cited. The warranty which the solicitor is held to give is that he has the authority of the party for whom he purports to act to take the necessary steps in the action; the solicitor does not warrant the correctness of the description of his client or his ability to pay damages if the plaintiff obtains a verdict. The solicitor had reasonable grounds for believing that he was acting for a company known as Liberal Opinion Limited; Mr. D. C. Lee was well known to him, and he was not liable for these costs until he knew that the company had not actually been registered, though steps had been taken for its registration: *Salton* v. *New Beeston Cycle Co.* (2) The plaintiff knew, or had

(1) (1847) 16 L. J. (Q.B.) 339. (2) [1900] 1 Ch. 43.

C. A 1911

SIMMONS v. LIBERAL OPINION LIMITED, DUNN, *In re.*

good grounds for believing, that the company did not exist, but he went on with his action and has even signed judgment against this non-existing company. As soon as he knew the company was not registered the plaintiff ought to have discontinued the action or have refused to go on to trial. Though there is no such company in existence, it was open to the plaintiff to treat it as the name under which Mr. Lee and others carried on this business, and this is what he apparently elected to do, by going on with his action after he had found out that the company did not exist. The plaintiff must shew that these costs have been thrown away by reason of the solicitor's want of authority. The solicitor is not to be made liable because it turns out that his assumed client has not assets to satisfy the judgment. The plaintiff's position is inconsistent; he alleges that there is no company in existence and yet he signs judgment against it and says the solicitor has misled him.

COZENS-HARDY M.R. This is an application in the action of *Simmons* v. *Liberal Opinion Limited* and in the matter of Mr. Dunn, a solicitor, asking that the solicitor should be ordered to pay the plaintiff's costs of the action less the sum of 150*l.* which has been received from a co-defendant, against whom the action has been discontinued upon terms. [After stating the nature of the libel action and the dates of the various steps taken by Dunn as solicitor for Liberal Opinion Limited, his Lordship continued:—]

On November 14 the plaintiff's solicitors, Messrs. Lewis & Lewis, wrote to Mr. Dunn a perfectly proper letter, saying that they had made exhaustive search and could not find that there was any such company as Liberal Opinion Limited. That was replied to by a letter of the 15th, which I can only describe as impertinent and improper. It invited Messrs. Lewis & Lewis to continue their research.

The action came on for trial on January 18 and 19. It was then ascertained that there was no such limited company either under the Companies Act or under the Industrial and Provident Societies Act, 1893. The jury gave a verdict for the plaintiff for 5000*l.* damages. In my opinion the proceedings in the action

have been futile, and the costs incurred by the plaintiff have been absolutely thrown away by reason of the appearance entered by Mr. Dunn for a non-existing corporation.

A solicitor must be held to warrant the authority which he claims as representing his client. *Yonge* v. *Toynbee* (1) is a recent illustration of this well-established principle. I do not think this is seriously contested, but it is sought to escape by arguing that Mr. Dunn had some persons for whom he was authorized to act, though, strange to say, he even now declines to say who were his clients. If A., B., and C. publish a newspaper under the style of the X. Company (Limited), the rules contain provisions that they may be sued under that style, but they must appear in their own names.

The whole proceedings in the present action are inconsistent with the theory now set up. In my opinion the judgment is not available against Mr. Dunn's unknown clients, and I fail to see that the plaintiff by signing judgment in the only way in which it could be signed, namely, against Liberal Opinion Limited has in any way altered the position. I think we have jurisdiction to order Mr. Dunn to pay the plaintiff's costs of the action (less 150*l.*), and that we ought to exercise this jurisdiction. The appeal must be allowed with costs here and below.

FLETCHER MOULTON L.J. I am of the same opinion. It is impossible to doubt that this action was brought against Liberal Opinion Limited as a company. The appearance was entered as a company and the proceedings were carried on by the solicitor on behalf of it as a company: see, for example, the answers to interrogatories, where Mr. Duncan Campbell Lee is referred to as the managing director of the defendant company, Liberal Opinion Limited, and Mr. Randall describes himself as secretary to the defendant company. Moreover when one looks at the facts of the case it is quite clear that everybody thought it was a company, and the solicitor for the defendants believed he was acting for a company. The consequence is that we must treat this as an action brought against a company. That company was non-existent, and therefore Mr. Dunn had no

(1) [1910] 1 K. B. 215.

C. A. 1911

SIMMONS v. LIBERAL OPINION LIMITED. DUNN, *In re.*

Fletcher Moulton L.J.

authority from any one to enter an appearance on behalf of a company. The proceedings were entirely abortive, and the judgment was against a non-existent company. It has always been held that a solicitor who enters an appearance warrants that he has authority from the client to enter that appearance. This is a matter of importance to the plaintiff, because if that appearance is not entered no action can be carried on. Judgment comes at once, and therefore where there is no existing defendant the plaintiff is not exposed to the costs of an abortive action.

This is a principle which has not only long been recognized, but it is a principle which is almost a necessity to the procedure in our Courts. A plaintiff cannot challenge the acts of the defendant's solicitor in the action. He is bound to treat them as acts authorized by the defendant himself, and if it were not held that the solicitor warrants that he has authority from his client to do all the things necessary for the action the gravest injustice might often be done. So I have no hesitation in coming to the conclusion that we ought to treat Mr. Dunn as having warranted his authority to enter the appearance and accordingly to hold him liable to pay the costs of the plaintiff in this action.

A suggestion has been made and pressed on behalf of Mr. Dunn that this action is not abortive, but that Mr. Duncan Campbell Lee, Mr. Dolman, and certain other persons who signed the application for registration must be treated as persons who carried on business under the firm and style of Liberal Opinion Limited, and therefore that the judgment is a judgment against them and that they duly authorized Mr. Dunn to enter an appearance for them. In my opinion there is a fallacy in every step of that argument. Those people never agreed to carry on business as Liberal Opinion Limited. All they agreed to do was to form an industrial company under that title. They no doubt intended that such company should carry on business, but none of them had any idea of doing, or any intention of doing, that which it is alleged they did. There are two things that must be clearly distinguished because they are quite different. The one is persons carrying on business under a particular name and style, and the other is persons doing acts which may bring upon them

the same responsibilities as if they had been carrying on that business. I do not say that it would have been impossible for the plaintiff in a properly framed action to make these people, or some of them, liable in the same way as the company would have been liable if it had existed, but that is not what the plaintiff has done. He has brought an action against this non-existent company, and has been led to continue it by the act of Mr. Dunn. You cannot say to the plaintiff, You must in order to free Mr. Dunn hold these people to be under the responsibilities which you perhaps have the right to hold them under. In my opinion the plaintiff carried on the action against the company and the company only. The company did not exist. He could have learnt that fact at once but for the unauthorized appearance which was entered by Mr. Dunn, and therefore he had the right to apply to the Court for an order that Mr. Dunn should pay the costs of the action, and I think we must make him do so.

BUCKLEY L.J. I am of the same opinion. Of the various steps which the solicitor took which have been detailed by the Master of the Rolls in his judgment, by far the most salient and important to my mind is his letter of November 15. Any solicitor may make a mistake. Mr. Dunn may have entered an appearance for Liberal Opinion Limited with a bona fide belief that such a corporation existed, and I assume, for the purpose of my judgment, that he was then under that belief. In that state of things the plaintiff's solicitors on November 14 wrote him a letter. The substance of that letter is this: "We have made searches and inquiries and we cannot find that there is any such corporation"; they use this language, which is perfectly courteous language: "We can only think that you were under a misapprehension when you appeared for your client as Liberal Opinion Limited"; and they ask this question: "We have to ask you by return of post to inform us what the exact constitution of Liberal Opinion may be, whether it is a partnership, or whether it is a private individual who carries on business under that name." To that inquiry Mr. Dunn replied by the letter of November 15. I make no comment upon what appears to me to

C. A. 1911

SIMMONS v. LIBERAL OPINION LIMITED. DUNN, *In re.*

Buckley L.J.

be the very discourteous tone of that letter. I do not decide this question on any ground of discourtesy, but, to my mind, the meaning of that letter is this: "You ask me who my client is—whether it is a firm, or what it is. I will not tell you. I accept the responsibility of saying that there is such a corporation as Liberal Opinion Limited. I congratulate you on the research which you have made. Please go on searching further." He took upon himself the responsibility of saying deliberately by that letter, to my mind, having regard to the question which was put to him, "I am perfectly right in entering an appearance for Liberal Opinion Limited. There is such a corporation." Of course in that he was wrong. The result of that was that the action went on, all the costs were incurred, and were incurred quite wrongly. I think under these circumstances the solicitor ought to be ordered to pay all the costs of the proceedings.

Appeal allowed.

Solicitors: *Lewis & Lewis; A. E. Dunn.*

W. C. D.

BROWNE *v.* BLACK.

1911
March 10.

Solicitor—Bill of Costs—Delivery of Bill—One Month before Action—"Sent by the post"—Time—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

By s. 37 of the Solicitors Act, 1843, no solicitor shall commence any action for the recovery of any fees, charges, or disbursements "until the expiration of one month after such . . . . solicitor . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode," a bill of such fees, charges, and disbursements.

By s. 48 "month" means calendar month.

Held, that "month" means a clear month; and that a bill is not "sent by the post" to the party to be charged one month before action unless it is posted at such a time that it will in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action, reckoning the month as exclusive of the days on which the bill is delivered and the action is commenced.

Appeal from the Mayor's Court.

The action was brought by a solicitor to recover the amount of a bill of costs for professional services rendered by him to the defendant as his solicitor. The defendant pleaded (so far as material) that the plaintiff did not one calendar month before action deliver to the defendant, being the party to be charged therewith, or send by post to or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements subscribed by the plaintiff or enclosed in or accompanied by a letter signed by him, as required by s. 37 of the Solicitors Act, 1843. (1)

(1) 6 & 7 Vict. c. 73, s. 37: "No attorney or solicitor . . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after such attorney or solicitor . . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor . . . . or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill . . . . "

Sect. 48: "In the construction of this Act the word 'month' shall be taken to mean a calendar month . . . . "

1911

BROWNE v. BLACK.

At the trial before the Common Serjeant it was proved that the plaintiff on the afternoon of February 15, 1910, posted a signed bill of costs addressed to the defendant, which in the ordinary course of post was delivered to the defendant on the morning of February 16. The action was commenced on March 16.

The Common Serjeant held that the word "month" in s. 37 meant a clear month, and that the words "sent by the post" were not complied with unless the bill was posted at such a time that in the ordinary course of post it would be delivered to the party chargeable one clear month before the commencement of the action. He accordingly held that the action was premature and was not maintainable.

The plaintiff appealed.

H. M. Sturges (*J. A. Foote, K.C.*, with him), for the plaintiff. A solicitor one month before commencing an action to recover costs from a client must, under s. 37 of the Solicitors Act, 1843, do one of three things. He must either deliver a bill of his fees, charges, and disbursements to the client personally, or send the bill to him by post, or leave it for him at his counting-house, office, dwelling-house, or last known place of abode. A document is "sent by the post" within the meaning of the section when it is put into the post office. That is the ordinary meaning of sending a letter by post. The plaintiff therefore by posting the signed bill of costs on February 15 sent it by the post to the defendant on that date, though in the ordinary course of post it was not received by the defendant until February 16. In *Dunn* v. *Hales* (1), after evidence had been given that the bill of costs had been posted to the defendant, evidence was offered to shew that the bill had not been received, but Watson B. said that "that will not be relevant as shewing that it could not have been posted to him. It would be enough that it was duly posted"; and in summing up to the jury he said that the question was "whether the bill signed was put into the post properly addressed to the defendant." That learned judge thought that putting the bill into the post was a compliance with the Act. This also seems to

(1) (1858) 1 F. & F. 174.

have been the opinion held by Parke B. in *Macgregor* v. *Keily*. (1) The Act has made the posting of the bill equivalent to a delivery of it to the client, just as when an offer is made by post the moment a letter accepting the offer is posted the offer is accepted: per Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (2) The Act imposes an obligation upon the solicitor, and the words of the Act ought not to be stretched so as to increase that obligation. The bill therefore was "sent by the post" on February 15, and as a calendar month from that date would be twenty-eight days the month expired at midnight on the evening of March 15, and the action was properly brought on March 16. [*Skilbeck* v. *Garbett* (3) was also referred to.]

Next, if the words "sent by the post" mean sent by post so that the bill would in the ordinary course of post be delivered to the client one month before action, that obligation has been fulfilled in this case, because "month" in s. 37 does not mean a clear month. The recognized rule is to exclude one terminal day and to include the other terminal day in the computation of the time: *Radcliffe* v. *Bartholomew*. (4) Including February 16 and excluding March 16 from the computation of the twenty-eight days which make up the calendar month, the month expired before the action was commenced, and the action is therefore maintainable. *Blunt* v. *Heslop* (5) may at first sight seem to be against this contention, but the words of the Act under construction in that case were different from those in s. 37 of the Solicitors Act, 1843. The Act in that case provided that no attorney or solicitor should commence or maintain an action for the recovery of fees, charges, or disbursements "until the expiration of one month or more" after the delivery of the bill. The Court relied upon those words as shewing that the Act contemplated a clear month.

[CHANNELL J. referred to *Rex* v. *Turner*. (6)]

Lewis Thomas, *K.C.*, and *A. Neilson*, for the defendant. The object of the provision in s. 37 of the Solicitors Act, 1843, that

(1) (1849) 3 Ex. 794, at p. 797.
(2) (1877) 2 App. Cas. 666, at pp. 691, 692.
(3) (1845) 7 Q. B. 846.
(4) [1892] 1 Q. B. 161.
(5) (1838) 8 Ad & E. 577.
(6) [1910] 1 K. B. 346, at p. 359.

1911

BROWNE v. BLACK.

a solicitor shall not commence an action for his costs until the expiration of one month after he shall have delivered a bill of those costs to his client is to give the client one month in which to examine the charges in the bill and if necessary take advice upon them. The words "sent by the post" are inserted between "delivered unto the party to be charged therewith" and "or left for him at his counting-house," &c. The section clearly indicates that the solicitor must do one or other of those things so as to ensure that the bill shall be in the possession of the client one month before he can commence an action upon it. "Sent by the post" therefore means that the bill must be posted so that in the ordinary course of post it will be delivered to the party chargeable one month before action. If that is done, *Dunn* v. *Hales* (1) is a decision to shew that it is not necessary also to prove that the bill has actually been received by the client; and *Skilbeck* v. *Garbett* (2) is only a decision upon the question whether sufficient proof of posting had been given. In *Macgregor* v. *Keily* (3) it was held that proof of the delivery of the bill of costs to a servant at the door of the client's residence was prima facie evidence of delivery of the bill to the defendant. No question arose as to posting the bill, and Parke B. does not say that "sent by the post" means putting into the post. The Act does not make the post office the agent of the client to receive the bill. The object of the enactment being that the client shall have the bill one month in his possession before an action can be brought, the word "month" must mean clear month. *Blunt* v. *Heslop* (4) is an authority in support of this proposition. The action therefore was commenced one day too soon and is not maintainable.

RIDLEY J. In this case the bill of costs was posted to the defendant on February 15 at such a time that it would in the ordinary course of post be delivered to him on the morning of February 16; and this action was commenced on March 16. In my opinion that is not a sufficient compliance with the provisions of s. 37 of the Solicitors Act, 1843. That section

(1) 1 F. & F. 174.
(2) 7 Q. B. 846.
(3) 3 Ex. 794.
(4) 8 Ad. & E. 577.

provides that no solicitor shall commence or maintain any action for the recovery of any fees, charges, or disbursements for any business done by such solicitor "until the expiration of one month after such . . . . solicitor . . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements" signed by him or accompanied by a letter signed by him. That enactment contemplates in the first place a delivery of the signed bill direct to the party chargeable, and then it allows the solicitor to avail himself of one of two alternative modes of delivery of the bill to the party chargeable; namely, to send it by post to him or to leave it at his counting-house, office, dwelling-house, or last known place of abode. Both of these alternative methods are considered as equivalent to delivery direct to the party chargeable. In this case the post office was adopted as the means of delivering the bill to the defendant. In *Dunn* v. *Hales* (1) it was held by Watson B. that proof that the bill was put properly addressed into the post was evidence of its delivery, but there it must be inferred that the bill was posted in sufficient time to allow of its delivery to the defendant in the ordinary course of post one month before the action was commenced. The object of the enactment is to give the client a month in which to consider the items in the bill and if necessary to take advice upon them. The bill is not, in my opinion, "sent by the post" to the client within the meaning of s. 37 when it has been merely put into the post. It must be posted at such a time that in the ordinary course of post it will be delivered to the client one month before action. Sending by the post then becomes equivalent to delivery direct to the client. That, to my mind, is the meaning of the words "sent by the post" in s. 37. The day, therefore, from which the month begins to run is the day when the bill would in the ordinary course of post be delivered to the defendant. In this case that day was February 16.

The next question is whether this action was commenced before the expiration of one month after that date. It is said that the

(1) 1 F. & F. 174.

1911

BROWNE v. BLACK.

Ridley J.

action was not brought before the expiration of the month because one terminal day must be included in the computation of the twenty-eight days which make up the calendar month. In *Rex* v. *Turner* (1), to which my brother Channell has referred, it is pointed out that, though the ordinary rule is that "where a certain number of days are specified they are to be reckoned exclusive of one of the days and inclusive of the other unless clear days are expressed," the difficulty is to ascertain whether clear days are expressed by the language of the particular statute. Where, as in this case, an act is directed not to be done until after the expiration of one month from a certain event, it means, in my opinion, a clear month. It is the same as if the space of one month were directed to intervene between the two acts to be done by the solicitor, namely, delivering the bill of costs and bringing the action. *Blunt* v. *Heslop* (2) is a decision upon a similar enactment to that before us, and it was held that a clear month must elapse between the delivery of the bill of costs and the commencement of the action. Sect. 37, which says that no action shall be commenced until the expiration of one month after the delivery of a signed bill, means therefore until the expiration of one clear month after the delivery of the bill. That being my view of the meaning of the section, this action was commenced one day too soon. The appeal must therefore be dismissed.

CHANNELL J. I am of the same opinion. I agree that the words of s. 37 of the Solicitors Act, 1843, "until the expiration of one month" mean until the expiration of one clear month, that is, by s. 48, one clear calendar month. When the month begins in February in any year except leap year a calendar month is equivalent to twenty-eight days; in other months the number of days varies according to the month. A clear calendar month must elapse between the delivery of the bill of costs and the commencement of the action, that is to say, reckoning the month exclusively of the days on which the bill is delivered and the action is commenced. If this bill had been delivered by hand to the defendant on February 16, the day on which the bill was in

(1) [1910] 1 K. B. 346, at p. 359. (2) 8 Ad. & E. 577.

1911

BROWNE v. BLACK.

Channell J.

the ordinary course of post received by the defendant, the twenty-eight days which make up the month of February would not have expired until the end of March 16, and therefore the action would have been commenced one day too soon. What then is the effect of sending the bill by post? The object of the enactment is to give the client a clear month in which to consider items in the bill and to decide what course he will take thereon. If the plaintiff's contention is correct that the posting of the bill is the material date though it may not in the ordinary course of post be delivered until the following day, then the client is deprived of one day of the month which is allowed to him for considering the bill. That being so, the only way in which, as it seems to me, the plaintiff can support his contention is by saying that the post office is made the agent of the client to receive the bill, and that the bill is to be deemed to be in the client's possession from the time when it is put into the post. In my opinion s. 37 does not have the effect of making the post office the agent of the client to receive the bill. The option is given to the solicitor to send the bill by post instead of delivering it into the hands of the client or leaving it at his counting-house, office, dwelling-house, or last known place of abode, and if the post office is to be deemed to be the agent of either party, it ought to be deemed to be the agent of the solicitor. The case cannot therefore be brought within the principle of the decisions that where a party has an election to accept an offer, and there is either an express or implied authority given to him by the person making the offer to accept it by post, the election to accept is complete as soon as the letter containing the acceptance is posted. Nor does the case of *Dunn* v. *Hales* (1) assist the plaintiff's contention. That case and cases of that nature only shew that it is not necessary for the solicitor to do more than prove that the signed bill properly addressed to the defendant was duly posted, and that it is not necessary to prove that it was actually delivered. I cannot think that the solicitor can by resorting to the medium of the post office deprive the client of one day in the month which is allowed to him by the section to consider the bill. The words "sent by the post" to the party to be

(1) 1 F. & F. 174.

1911

BROWNE v. BLACK.

Channell J.

charged mean posted at such a time that in the ordinary course of post the bill will be delivered to him at the time named in the section, that is to say, one clear month before the commencement of the action. In the present case the bill was delivered in the ordinary course of post to the defendant on February 16, and the clear calendar month ran from that date, in the same way as if the bill had been delivered to him personally by the solicitor on that day. The action was therefore commenced one day too soon, and the decision of the learned Common Serjeant was right.

Appeal dismissed.

Solicitors for plaintiff: *Woodthorpe, Browne & Co.*
Solicitors for defendant: *Robert Greening & Siggs.*

W. F. B.

C. A.

1911

Feb. 22.

[IN THE COURT OF APPEAL.]

ROLES *v.* PASCALL & SONS.

Employer and Workman—Compensation—Reasonable Cause for not giving Notice—Mistake—Ignorance of Existence of Act—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

Ignorance on the part of a workman of the existence of the Workmen's Compensation Act, 1906, and of any right to compensation for an accident arising out of his employment, is not a "mistake" nor a "reasonable cause" for not giving notice of an accident within the meaning of s. 2 of the Act.

THE applicant in this case was a carman in the occupation of the respondents. On July 15, 1909, he was leading a horse and van loaded with bricks on soft ground when the horse plunged, the harness broke, and the applicant was thrown to the ground and injured his left hip. He continued in his employment for some weeks, but his hip got worse and he was unable to go on working. From August 19 to November 13 he was attended by his own doctor, who treated him for sciatica. He afterwards went to Guy's Hospital, and the doctors there diagnosed his case as traumatic arthritis caused by his accident. He gave verbal notice of his accident to his employers on April 27, 1910,

and made a claim in writing on June 22, 1910. The reason given by the applicant for failure to give notice of the accident or to make his claim for compensation within the time specified by s. 2 of the Workmen's Compensation Act, 1906 (1), was that he did not know of the existence of the Act or that he was entitled to compensation for injury by accident arising out of and in the course of his employment. He stated that he first learned of the existence of the Act and his right to compensation when attending Guy's Hospital in April, 1910, and then gave notice.

The county court judge found that these statements were in fact true, and that the respondents were not prejudiced by the failure to give notice of the accident, and he decided as a point of law that whether the ignorance of the workman as to the existence of the Act could be held to be a mistake or not, as to which he doubted, such ignorance was a reasonable cause for his failure to make his claim to compensation within the time specified by the Act.

The employers appealed.

Duckworth, for the appellants. The ignorance of the workman cannot be a mistake, and, I submit, it is not a reasonable cause for failure to give notice.

(1) Workmen's Compensation Act, 1906, s. 2:

"(1.) Proceedings for the recovery, under this Act, of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . . and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury . . . .

"Provided always that—

"(*a*) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not . . . . prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

"(*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

C. A. 1911 ROLES v. PASCALL & SONS.

The point was decided in *Bramley* v. *Evans* (1) ; and it was decided in two Scotch cases that ignorance was not an excuse for failure to give notice under the Employers' Liability Act, 1880 : *Connolly* v. *Young's Paraffin Co.* (2) ; *M'Fadyen* v. *Dalmellington.* (3)

F. O. Robinson, for the respondent. The county court judge, having found as a fact that the respondent did not know of the existence of the Workmen's Compensation Act, rightly held as a matter of law that the want of notice and the failure to make the claim within the prescribed time were occasioned by a reasonable cause within the meaning of s. 2, sub-s. 1, of the Act. It is impossible for a man to comply with the provisions of an Act of Parliament if he is ignorant of the existence of the Act, and his failure to do so in those circumstances cannot, therefore, be said to be unreasonable. No general principle or standard can be laid down as to what constitutes reasonable cause, for it must depend in each case on the facts found with regard to the particular applicant. It may have been unreasonable for this man to be as ignorant as he was, but assuming that he was in a condition of unreasonable ignorance, his failure to comply with the requirements of the Act was just as much due to a reasonable cause as it would be in the case of an infant or an insane person. Failure to give notice or to make a claim is also excused under s. 2, sub-s. 1, if it is occasioned by a mistake. The respondent's ignorance of the existence of the Act was a "mistake" within the meaning of the section, whether it be regarded as a mistake of fact or of law. The mistake consisted in not knowing that the occurrence of the accident conferred upon him certain rights which he did not otherwise possess. The statement in the headnote to *Bramley* v. *Evans* (1) that it was held in that case that "ignorance of law is not a 'mistake' within the section" is not borne out by the facts of the case as reported, for there was no finding of fact that the applicant was ignorant of law, and the case was decided by the county court judge on the ground that the employers had been prejudiced by the want

(1) (1909) 3 Butterworth W. C. C. 34. (2) (1894) 22 R. 80.
(3) (1897) 34 Sc. L. R. 266.

of notice. That case ought not, therefore, to be treated as an authority in favour of the appellants.

COZENS-HARDY M.R. This appeal raises a somewhat curious point.

For the present purpose we are to assume that there was an accident, that it was an accident arising out of and in the course of the employment, and that notice was given within a reasonable time, or, at least, under circumstances which justified the learned county court judge in saying that the employer was not prejudiced; but no claim was made until much more than the six months had expired, the accident having taken place in July, 1909, and no formal claim being made until June in the following year, eleven months and more later.

That, of course, is a complete answer to the applicant's claim for compensation unless the case can be brought within s. 2, sub-s. 1 (*b*), which says: "The failure to make a claim within the period above specified"—that is within six months—"shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." We have nothing to do with absence from the United Kingdom. It is suggested that the failure to make the claim was occasioned by mistake, or, at least, by "other reasonable cause." The learned county court judge has found the facts for us very concisely and very clearly. [The Master of the Rolls read the statement of facts from the county court judge's statement which is in effect set out above.] In my opinion that is not at all what is meant by "mistake." A mistake means that a man takes a wrong view as to the construction or effect of an Act of Parliament, if it be a mistake of law. A mistake of fact may be that the notice is given to some person whom the workman believed to be an agent or a person entitled to receive the notice when he was not. Many instances of that kind may be given. But mistake is not identical with ignorance. That is really what the argument for the respondent means. Then is it a "reasonable cause" for a man not giving a notice that he is not aware of the Act of Parliament at all? In my opinion it is not. I think that those words are intended to

C. A. 1911

ROLES v. PASCALL & SONS.

Cozens-Hardy M.R.

meet an entirely different class of case. If, for instance, the employer has been paying compensation for a time without any formal notice of claim, that may be a very good reasonable cause why the workman did not make the formal claim within the six months. I merely give that as an illustration which is quite sufficient, I think, to satisfy the words of the section, and which is consistent with good sense.

In my opinion, we should be, in fact, really repealing the six months' period of limitation, which is distinctly imposed by the Act, if we were to say that any person could escape from that and bring his claim any time afterwards if he could prove that he had never heard of the existence of the Act, or did not know anything about its contents.

In my opinion that cannot be right, and I think that this appeal ought to be allowed, and the workman's application dismissed with the usual consequences.

FLETCHER MOULTON L.J. I am of the same opinion. There is no possible pretence for arguing that complete ignorance of the existence of the Workmen's Compensation Act comes under the head of "mistake." The only point which might be open to argument would be that it constituted "reasonable cause." But I do not think that that can stand examination. To hold that ignorance of the existence of an Act or its consequences is a reasonable cause for failing to comply with the obligations which the Act puts upon those who make claims for compensation would be tantamount to repealing that part of the Act. That is not what this section means. I am of opinion, therefore, that ignorance of the existence of the Act is not a reasonable cause.

I may add that I am certain from memory that this point has been before the Court on a previous occasion and has been decided in the same sense. There is only one case which seems, by the head-note, to support my memory; but the report is either imperfect, or the case did not actually raise the point. It may be that that was not the case in which it was raised and decided; but I am perfectly satisfied that what we are laying down now is not new law.

BUCKLEY L.J. *Bramley* v. *Evans* (1) turned upon the question whether the employer was prejudiced by the absence of notice and has but little bearing on the case before us. Assuming that it has some bearing, it is only on the meaning of the word "mistake" and not on the words "reasonable cause."

The point that we have to decide is whether ignorance on the part of the workman that there is such an Act as the Workmen's Compensation Act can be reasonable cause for not giving notice. To my mind "reasonable cause" means some cause to which, as between master and servant, regard may reasonably be paid. A mistake exists when a person erroneously thinks that one state of facts exists when, in reality, another state of facts exists; this man was not in that position. He did not think that there was not such an Act as the Workmen's Compensation Act or make any mistake as to its contents or effect. He thought nothing at all about Acts of Parliament. His condition of mind was one not of mistake, but of ignorance. Then as to "reasonable cause":—As between master and servant, it is not reasonable to say to the master, "You must really treat this servant leniently because he never heard of this Act of Parliament which was passed expressly for the benefit of the class of which he is one." That is not a reasonable cause as between those two persons. I do not think that any of the words of s. 2, sub-s. 1 (*b*), are satisfied. The failure of the workman was occasioned by the fact that, unfortunately, he was not aware that there was an Act of Parliament for his benefit and did not make any claim. I do not think that that falls within any of the words of the section.

Appeal allowed.

Solicitors: *William Hurd & Son; Marshall & Powell, Croydon.*

(1) 3 Butterworth W. C. C. 34.

J. R. B.

C. A.
1911
Feb. 23.

[IN THE COURT OF APPEAL.]

HAWKINS *v.* POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

Employer and Workman—Compensation—Cause of Death—Accident arising out of Employment — Disease — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An elderly man employed as a timberman at a colliery was engaged on the morning shift in helping to push empty trucks up an incline and tumble them off the rails to allow full trucks to pass. He then set to work to cut a timber prop into shape. Ten minutes later he complained of being in pain, and he died in the evening of the same day of angina pectoris. The widow applied under the Workmen's Compensation Act, 1906, for compensation against the colliery owners. The medical evidence shewed that the man's heart was in a diseased condition, which might have been of long standing, that in the case of a man of his age a fatal attack might have been brought on by any slight exertion, and that the symptoms of the attack did not always appear immediately. The county court judge found that the death was caused by over-exertion in tumbling the trucks and made an award in favour of the applicant:—

Held, that there was no evidence to justify the finding of the county court judge.

Appeal from an award of the judge of the Tredegar County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of a man named Hawkins who was employed as a timberman at the respondents' collieries. At the date of his death he was aged sixty-two. On the morning of August 13, 1910, he went to work at the collieries, being apparently in good health. He and a man named Preece proceeded to fill two trams of rubbish. In order to allow them to pass it was necessary to tumble any empty trams off the road. Accordingly Hawkins and Preece pushed two empty trams a few yards up an incline (between two and three inches to the yard) and, with the aid of a third man, tumbled them off the road. The evidence shewed that the work of shifting and tumbling the trams was not heavy work for the number of men engaged. After the tumbling

of the second tram Hawkins started shaping a timber prop. Ten minutes later he complained of feeling ill, and he sat down for an hour and a half, trying to work at intervals. He was in great pain and was heard belching from time to time. He stayed till the end of the shift and then walked home. He died in the evening.

A post mortem examination was held, and the doctors who were present gave evidence upon the application for compensation. The medical evidence shewed that death was probably due to angina pectoris. There was a patch of atheromatous disease at the aortic valve, and another small patch at the mouth of one of the coronary arteries. These patches might have been of long standing. Having regard to the existence of those two patches very mild exertion on the part of a man of Hawkins's age might bring on a spasmodic attack of the heart, which might or might not end fatally. It was not usual for a first attack of angina pectoris to prove fatal, but cases had been known in which this had occurred. An attack was frequently associated with belching; it might or might not shew immediate symptoms: it might be brought on by walking against a wind or by walking upstairs, or even by emotional excitement. Sometimes the symptoms did not appear until a considerable time after the exertion which caused the attack. It was possible that the death might have been caused by acute dyspepsia, the pressure of the wind in the stomach affecting the heart.

The county court judge come to the conclusion upon the whole of the evidence that the deceased over-exerted himself during the operation of pushing or tumbling a tram and thereby brought on an attack of heart trouble from which he died. He therefore made an award in favour of the applicant.

The employers appealed.

C. A. Russell, K.C., and *Albert Parsons*, for the appellants. There was here no evidence that the angina pectoris was caused by anything that the deceased man was doing at the colliery. The case rests upon conjecture only, and therefore the respondent has failed to discharge the burthen of proof which lay upon her This case is distinguishable from *Clover, Clayton & Co., Ld.* v.

C. A. 1911

HAWKINS v. POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

Hughes (1) and falls within *Barnabas* v. *Bersham Colliery Co.* (2) Where a man is carrying about with him a diseased condition such that death may result from any one of several causes there must be direct evidence of the connection of the death with the employment. That evidence existed in *Hughes's Case* (1), which has gone to the very limit of what can be an accident, but it is wanting in this case, as it was wanting in *Barnabas's Case.* (2)

[COZENS-HARDY M.R. It is sufficient to prove facts from which the Court may draw the inference that the accident arose out of the employment: *Mitchell* v. *Glamorgan Coal Co.* (3)]

Here the judge went beyond the bounds of legitimate conjecture.

Sankey, K.C., and *Ivor Bowen*, for the respondent. All that has to be proved is that the work contributed in some material degree to the accident: *Clover, Clayton & Co., Ld.* v. *Hughes.* (4) The Court must have some regard to the probabilities of the case, and there was no other probable cause of death except the tumbling of the truck. The learned county court judge was entitled to draw the inference from the medical evidence that the angina pectoris and the exertion of tumbling the truck were so nearly contemporaneous that the one was caused by the other.

C. A. Russell, K.C., replied.

COZENS-HARDY M.R. This case has been very ably argued and it presents some difficulty, but having carefully considered the case I feel unable to come to the conclusion that there was any evidence which justified the decision at which the learned county court judge has arrived. We have guides to help us in deciding cases of this nature in two recent authorities in the House of Lords, in both of which cases the view taken by this Court was adopted by the House of Lords. The first case, *Clover, Clayton & Co., Ld.* v. *Hughes* (1), seems to me to have very little bearing upon anything which we have to decide here. There a man was using a spanner to tighten a nut, an employment

(1) [1910] A. C. 242.
(2) (1910) 3 B. W. C. C. 216; 103 L. T. 513.
(3) (1907) 23 Times L. R. 588.
(4) [1910] A. C. 242, 247.

which involved, no doubt, a certain amount of exertion, but not a very heavy exertion for a man in ordinary health. But the workman there was in a condition in which his arteries were very bad, and it was proved to demonstration that the actual breaking of the artery immediately followed on the turning of the spanner, and in fact was due to that exertion, although it was an exertion which, if the man had not brought this disease or disablement with him, would not have had any such ill consequences. The only question which arose for decision in this Court, and ultimately in the House of Lords, was whether in such circumstances there was an "accident," or whether the death was the consequence of the disability which the man had. This Court held, and the House of Lords, by a majority, affirmed the view, that the death was due to an accident, and none the less that it would not have been an accident if the man had not brought this disablement with him. Then shortly afterwards came the case of *Barnabas* v. *Bersham Colliery Co.* (1) That was a very peculiar case. A man was working in a colliery. Nobody was actually in a position to see him, but the man was so near the men working in another stall that they could hear him. They heard him whistling; they heard him ask what o'clock it was; they knew what he was doing, namely, building up a pack—work which, though not excessively heavy work for an ordinary man, undoubtedly involved considerable exertion. Suddenly he ceased to work and vomiting was heard. After a certain lapse of time the men who heard it went to look and found the man lying down. In fact he had had a fit of apoplexy. The county court judge found that the man died from apoplexy brought on by the strain produced by the heavy work of building the pack, and he made his award accordingly. I do not desire to read my own judgment over again; I could only repeat what I said there; but in that case I indicated my own view, with which, I think, my brothers entirely agreed, namely, that it is not sufficient to prove that a man meets with death in a colliery, or meets with what in a popular sense would be an accident in a colliery, whether it be apoplexy or angina pectoris, unless it is established, either by

(1) 3 B. W. C. C. 216; 103 L. T. 513.

C. A. 1911

HAWKINS v. POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

Cozens-Hardy M.R.

direct evidence, or by legitimate inference from the facts which are proved, that the accident arose out of as well as in the course of the employment. It will not do to leave that matter in doubt. The burthen of proof is put upon the applicants, the workman's dependants, and that burthen is not satisfied if they merely leave this a matter of conjecture, a matter of surmise, a matter of inference, unless it is an inference within the words I have just used, a legitimate inference justified by the circumstances of the case. We set aside the finding of the county court judge, and from our decision there was an appeal to the House of Lords. Lord Loreburn L.C. said this: "In cases under this Act, in the same way as in cases under any other Act or at common law, the plaintiff must prove his case; and although he may establish a state of facts which leads one to think that his version is quite a possible version of what took place, he must do something more than shew a state of facts which is consistent either with one view or with another view." Lord Halsbury said: "Propositions must be proved in a Court of law by proof of evidence, and that is not satisfied by surmise, conjecture, or guess." Guided by those two decisions, in so far as they lay down, and I think they do lay down, general principles for our guidance, let us see what is the course which we ought to pursue here.

The deceased man was engaged in a colliery. He was a man who, as proved by the post mortem examination, had disease at the mouth of the aortic valve and also at the mouth of the arteries. That might have been of long standing. What was his work in the colliery? His work in the colliery was not work which could in any way be called heavy work. It was not work which involved any excessive exertion. It consisted in pushing with the help of one other man an empty truck up an incline and then, in case of need, with the help of two others, tumbling or turning over the empty truck, in order to allow a full truck to pass. Neither branch of the work which I have just attempted to describe was heavy work or involved any serious exertion. The deceased man had done that work in the morning. When it was over he went to some other work, the shaping or preparing of props. He did that, roughly speaking, for ten minutes after his other work had ceased.

There is no suggestion of any complaint having been made to his mates while he was engaged upon this work. There is no suggestion that when he went to cut the props he was apparently suffering from anything at all; but after he had been doing that work for ten minutes, more or less, he was in pain, and, to cut the matter short, he went home and died that same day. He died from angina pectoris. What is there to connect his death with anything he was doing in the colliery? I cannot satisfy myself that there was anything in the circumstances of this man's work to justify the inference that the death arose out of the employment. The evidence of the doctors may, I think, be not unfairly stated thus: The deceased man's arteries were in bad condition of long standing. Angina pectoris may be brought on by a variety of means; it may be due to circumstances which can scarcely be called an accident at all. It may be brought on by walking against a strong wind or by walking upstairs; it may be due to very slight exertion. It does not always come on immediately after the exertion has been made. You cannot predicate that the exertion made now will immediately or within any definite space of time result in the attack which proves fatal.

In that state of things is it possible for us to say that this angina pectoris was due to the work which the man had been doing in the colliery on that day? Is it not possible that it may be due to some other cause—exertion outside the colliery; exertion extending over a different period in a different place and of a different nature? Is it possible for us to say, sitting here judicially, that the test which was laid down in *Barnabas* v. *Bersham Colliery Co.* (1) has been satisfied, that the applicant has proved by direct evidence or by legitimate inference from the facts proved that the angina pectoris was due to what took place in the colliery and not elsewhere? I am unable to answer that question in favour of the applicant in this case. It seems to me that she has not discharged the burthen of proof which admittedly rests upon her, and that the learned county court judge was not entitled to indulge in surmise, or speculation or conjecture or guess, which in fact, as it seems to me, he did. I have therefore

(1) 3 B. W. C. C. 216; 103 L. T. 513.

C. A. 1911

HAWKINS v. POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

come to the conclusion that this appeal must be allowed on the ground that there is no proof that the accident arose out of and in the course of the employment.

FLETCHER MOULTON L.J. This case has given me a good deal of doubt and difficulty, and, if our decision rested solely on the notes of the learned judge, I am not sure how I should have felt bound to decide. But the passages which have been read from the shorthand notes have thrown considerable light on some of the language there used, and in one case have shewn a serious error, in that the learned judge either in copying the notes or in the hurry of writing them originally left out a "not" and made the sentence mean exactly the opposite to what the witness had said. So that we have now to decide the case on the evidence supplied by the notes of the learned judge coupled with the assistance we have had from the shorthand notes, and taking the whole of the material together I have come to the conclusion that there was here no evidence which would justify the learned county court judge in coming to the conclusion to which he did come.

Speaking for myself, I have no difficulty in thinking that the work of the deceased man at the trams was the cause of his death. I know that the evidence of his co-workmen was that the exertion required was not severe, but I think that there are two remarks to be made about that evidence before it can be applied to the case of the deceased himself. In the first place he was a man somewhat advanced in years and with a weak heart, and exertion that would not be excessive for persons in the enjoyment of full health might be severe for him. In the next place every one knows that in such work as moving heavy bodies and pushing trucks along tram lines or tumbling them off the rails the work is at moments not evenly divided between the persons who are doing it, and there may be moments of sudden strain on one or the other of the parties at work greatly in excess of what the strain would be if the effort was always equally divided between them all. So that, to my mind, it is quite likely that there were moments of considerable strain on the deceased occurring during that work, and, if I had to make

a conjecture, I think the most probable conjecture is that this was the real cause of the attack of angina pectoris. So far I go with the applicant. But that is not sufficient to establish the case of those who are applying for compensation. They have to prove their case; that is to say, they must shew with reasonable clearness that the accident actually did come from the employment. Many phrases have been used in this connection, all of them useful but all of them liable to abuse. Inference is certainly not excluded if it be a legitimate inference. Proof is required, but on the other hand proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion as a fact that the employment was the cause of the death. If that evidence is forthcoming that is sufficient to establish the applicant's case. I have said that I think it is the most probable conjecture that the angina pectoris was actually caused by this work, but it does not rise above conjecture, for there are at least two other causes from which it might have come. It might have come from the disordered state of the man's stomach producing pressure on his heart. When I say it might have come I mean that this is the fair conclusion to be drawn from the medical evidence. There is nothing to exclude that from having been the cause. At the same time it may have come from an exertion outside the colliery, unconnected with the employment, because the evidence shews that angina pectoris may come on at a considerable interval of time after the exertion by which it has been caused. I can see nothing which excludes either of those two causes. It might have come from either of them, or it might have come, as I have said, from the employment. We should not only be going against the decision of the House of Lords in similar cases, but we should be going against the obvious duty of the Court in dealing with questions of evidence, if we decided that such evidence as this could be sufficient to establish the dependants' case. We are bound to say that when dependants leave the case in that condition they have not given evidence justifying a judge in deciding in their favour. They have simply shewn that it is possible that the accident arose

C. A. 1911

HAWKINS v. POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

out of the employment. In these circumstances I think that the appeal ought to be allowed.

BUCKLEY L.J. The decision in *Clover, Clayton & Co., Ld.* v. *Hughes* (1) is easy of summary. The bowstring was so frayed and worn that it had well nigh parted. One drew the bow and the string snapped. Did the string snap by accident? That was the nature of the question which had to be determined in *Clover, Clayton & Co., Ld.* v. *Hughes*. (1) The sequence of events was not in dispute. The man was engaged in doing an act involving very slight exertion, but as the result the aneurism ruptured. Was that an accident? That was the sole question for decision. The House of Lords held that it was.

The question for decision here is very different; it is this: Fact A was succeeded by fact B. Is it proved that B was the consequence of A? That was the question in *Barnabas* v. *Bersham Colliery Co.* (2) This Court answered it by saying that there was nothing to connect the one fact with the other, and the House of Lords were of the same opinion. The same is true in the present case. When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture, or guess. Here there was no evidence to prove that this man's death resulted from an accident arising out of and in the course of his employment. It may have so resulted or it may have resulted from a different cause. According to the medical evidence wind in the stomach would produce the belching from which the man suffered at the time; that may have produced such pressure upon the heart as to lead to a fatal result. That was one possible cause. The exertion arising from the employment was another possible cause. It is not enough to say that the latter is a possible cause. It must be established to my

(1) [1910] A. C. 242. (2) 3 B. W. C. C. 216; 103 L. T. 513.

satisfaction that it was the cause. Is it proved, that is to say, is it established to my satisfaction by facts which are given in evidence, that the death of the man resulted from the employment? In my opinion there is no evidence to prove it. It is simply a guess. I might guess that it came from it, when after all it came from something else. That will not do; the applicant must prove her case. I think that this case is covered by *Barnabas* v. *Bersham Colliery Co.* (1) and that the appeal must succeed.

C. A. 1911

HAWKINS v. POWELLS TILLERY STEAM COAL COMPANY, LIMITED.

Buckley L.J.

Appeal allowed.

Solicitors for appellants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for respondent: *Metcalfe & Sharpe, for T. S. Edwards, Newport, Mon.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1911 *March* 1, 2.

PIERCE v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Collector—Bicycle Accident—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A collector and canvasser to an industrial company, whilst riding a bicycle in the course of his employment, was knocked down and killed by a tramcar. The fact that he used a bicycle for the purposes of his employment was known to and not forbidden by the company:—

Held, that the accident arose out of the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

McNeice v. *Singer Sewing Machine Co., Ld.*, 1911 S. C. 12, followed.

Warner v. *Couchman*, [1911] 1 K. B. 351, distinguished.

APPEAL from an award of the judge of the Birkenhead County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of a man who was employed by the respondent company as canvasser and collector in the Birkenhead district. The district allotted to him was triangular in

(1) 3 B. W. C. C. 216; 103 L. T. 513.

C. A. 1911

PIERCE v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED.

shape, each side of the triangle measuring about two miles. On September 30, 1910, while going his rounds on a bicycle, he was knocked down by an electric car and killed. The facts found by the county court judge were as follows: For some nine months before the accident the deceased had been in the habit (like many others similarly employed) of riding a bicycle for the purpose of going from place to place in the course of his work, and this was known to and not forbidden by his employers. It was no part of his duty, however, to ride a bicycle for this purpose. Although permitted, it was neither required nor desired nor encouraged by his employers. They received no benefit from it, and, as far as their interests were concerned, the work could have been done just as well, if not better, on foot.

From these facts the learned county court judge drew the conclusion that the risk of a bicycle accident was not one which was incident to the business in which the deceased was engaged, and he held that the accident did not arise out of his employment though it undoubtedly arose in the course of it. He accordingly made an award in favour of the respondent company.

The applicant appealed.

F. Cuthbert Smith, for the appellant. The deceased met his death from an accident arising out of as well as in the course of his employment. The use of the bicycle by the deceased for the purposes of his employment was permitted by his employers in that it was known to and not forbidden by them, and the deceased was by the nature of his employment more exposed to the risks of the streets than ordinary members of the public: *Douglas* v. *United Mineral Mining Co., Ld.* (1); *McNeice* v. *Singer Sewing Machine Co., Ld.* (2); *Dickinson* v. "*Barmak*," *Ld.* (3)

Harold Newell, for the respondents. First, this accident did not arise out of the employment since it was due to the risk of the streets to which any member of the public is exposed: *Warner* v. *Couchman.* (4)

[COZENS-HARDY M.R. referred to *Andrew* v. *Failsworth Industrial Society, Ld.* (5)]

(1) (1900) 2 W. C. C. 15.
(2) 1911 S. C. 12.
(3) (1908) 124 L. T. Jo. 403.
(4) [1911] 1 K. B. 351.
(5) [1904] 2 K. B. 32.

There the deceased was on a scaffold, and the ground of that decision was that the workman was by his position exposed to unusual risk of being struck by lightning. If he had been working on the level the accident would not have arisen out of his employment: *Kelly* v. *Kerry County Council.* (1) Secondly, the deceased voluntarily took upon himself an unnecessary risk, and his employers ought not to be held responsible for that. In *McNeice* v. *Singer Sewing Machine Co., Ld.* (2) there is nothing in the evidence inconsistent with the view that the employers directed the workman to ride a bicycle. For this purpose there is a material distinction between "directing" and "permitting."

COZENS-HARDY M.R. Notwithstanding the able arguments addressed to us on behalf of the respondents I think it clear that the learned county court judge has misdirected himself in point of law. I may say at once that if he had had the advantage of reading the judgment of the Lord President in the Scotch case of *McNeice* v. *Singer Sewing Machine Co., Ld.* (2) he would probably have arrived at a different conclusion. The deceased man was a collector to the respondent company. He had a district of two miles or two and a half miles of triangular shape. He had to make a great number of calls on various houses to collect subscriptions and canvass new subscribers. He went his rounds on a bicycle. He was not directed to use a bicycle; he was not forbidden to use a bicycle. The learned county court judge finds this expressly. [The Master of the Rolls read the findings of the learned county court judge, and continued.] Thus we have it that without any prohibition from his employers he did his work by going on his bicycle on his rounds. This work of course necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public. Two points have been raised by counsel for the respondents. He says, first, that the risk of the streets is a risk to which everybody is subject, and that this man who was

(1) (1908) 42 I. L. T. 23; 1 B. W. C. C. 94. (2) 1911 S. C. 12.

C. A. 1911

PIERCE v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED.

Cozens-Hardy M.R.

knocked down and killed by an electric car was not more exposed than any other member of the public; and secondly that, although the accident arose in the course of, it did not arise out of, his employment. I will deal first with the point as to risk. Is that sound in law? I think not. *Andrew* v. *Failsworth Industrial Society, Ld.* (1) (the lightning case) is one leading authority on that point. There the county court judge found as a fact that the man was working on a scaffold at a considerable height and was more exposed to risk than other people. Collins M.R. said: "If there is under particular circumstances in a particular vocation something appreciably and substantially beyond the normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment."

Side by side with that we find the case in the Irish Court of Appeal of *Kelly* v. *Kerry County Council* (2), where a man was working on the high road and was struck by lightning. He was exactly in the same position as the whole of the agricultural population of the whole of the county, and therefore it was a case in which the accident could not be said to arise out of and in the course of his employment. Then came *Warner* v. *Couchman* (3), in which there was a difference of opinion between the members of this Court. But I think there was no difference of opinion as to the principle applicable to cases of this kind. There was a difference as to whether the facts of that particular case brought it within or just outside that particular principle. The majority of the Court thought that the risk from frost-bite, which was the injury in question, was one to which the whole agricultural population of England is subject, and that there was therefore nothing to bring that case within the rule that this was an accident arising out of and in the course of his employment. Fletcher Moulton L.J. thought that the man was more exposed than the rest of the agricultural population, but I do not think there was any difference whatever in principle between any of the members of the Court in that case. Then comes the case of *McNeice*

(1) [1904] 2 K. B. 32. (2) 42 I. L. T. 23; 1 B. W. C. C. 94.
(3) [1911] 1 K. B 351.

v. *Singer Sewing Machine Co., Ld.* (1) in the Court of Session. Upon the first point of the argument which has been addressed to us the judgment of the Lord President is a direct authority—an authority which I agree is not binding upon us, but an authority which I cordially accept because I entirely approve of the reasoning upon which it is based. There the man was a salesman and collector. Here the man is not a salesman exactly; he is a canvasser and collector; but it is impossible to draw any distinction between those two employments. He was riding a bicycle in the course of his employment and was kicked by a horse. The sheriff-substitute held that the accident did not arise out of the employment. The Court of Session held that it did, and the Lord President says this: "The only question to be determined that has been argued before us is whether" the accident "arose out of the employment. Now I think it did. I think that it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as collector forced him to traverse the streets. And I think, therefore, that a danger, which is an ordinary danger of the street—and I think we are entitled of our own knowledge to know that the behaviour of a passing horse is one of the ordinary dangers of the street—is therefore a danger arising out of his employment." I respectfully desire to adopt that decision and follow it in the present case upon the first point that was argued, namely, that this accident, due to a man riding a bicycle in the course of his employment, does not give him a right to claim against the company because any one else in the streets is exposed to the same risk. I think that this man was more exposed than other people. His employment exposed him to the risks of the streets practically all day long, allowing only for the intervals of going inside the houses of the people he was visiting. But then it is said that in the Scotch case the man was directed to go on a bicycle. I can see nothing in that point. If I tell a man to go an errand I do not direct him to walk. If I know that he uses any particular mode of locomotion and do not prohibit it, it seems to me unimportant whether I direct him to use that

(1) 1911 S. C. 12.

C. A. 1911

PIERCE v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED.

Cozens-Hardy M.R.

particular mode or whether I permit him. Here on the findings of the county court judge, the use of the bicycle was known to and not forbidden by the employers: it was therefore permitted. The accident happened in the street under the circumstances I have mentioned. I think there is nothing in the point that this permitted mode of going from place to place might possibly be more risky than going on foot. For these reasons I think that the learned county court judge has misdirected himself and that this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. I think that this case is concluded by the finding of the learned county court judge that this was a permitted mode of locomotion. It was known to and not forbidden by his employers; it was permitted although it was not directed. That being so, we can draw no distinction between that and any other permitted mode of locomotion. A man who in the course of his employment has to get about the streets may do so on foot or in a tramcar or in a carriage or motor car or on a bicycle. Each of them has its own risks and each is free from some of the risks which affect the others. We have not to balance these risks one against the other. So soon as it is clear that this mode of locomotion is permitted by the master the workman in adopting it is acting within the scope of his employment.

Now if a person is employed on work which requires him thus to be about in the streets, requires him thus to run the risk of the streets, and an accident occurs as the result of that risk, it seems to me a typical case of an accident arising out of and in the course of his employment. I agree with what the Master of the Rolls has said about *Warner* v. *Couchman*. (1) The difference between the members of the Court was not upon any question of principle, but I, differing from my brethren, thought that the accident was brought on by the man's being exposed by his employment to the particular risk in question in that case, and none the less so because many other employments might be mentioned in which he would be equally exposed to that risk. I agree that this appeal should be allowed.

(1) [1911] 1 K. B. 351

BUCKLEY L.J. The question whether the accident is the result of a risk to which all mankind are more or less exposed is in my judgment not an exhaustive test of the question whether or not the accident arises out of the employment. The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind. Take the case of a railway accident. It is scarcely too much to say that everybody travels by railway. But a railway guard is exceptionally exposed to the risk of a railway accident because it is his duty during his employment to be continually upon the train and exposed to possibilities of collision, derailment, and the like. His employment involves that he shall run daily and hourly a risk which a passenger runs occasionally. A railway guard who is injured or killed in a railway accident suffers from an accident arising not only in the course of but out of his employment. In the case before us the man was a collector and canvasser and for the purposes of his employment it was his duty throughout the day to be continually passing from place to place through the streets. He was thus exceptionally exposed to street accidents. He might go his rounds in various ways. He might travel on foot, or by omnibus, tramcar, or railway. He did, in fact, go on a bicycle. The learned county court judge has found that, when the accident happened, he was engaged on his duties, and that it was known to and not forbidden by his employers that he went about his district on his bicycle. The deceased was therefore using a legitimate mode of locomotion for the purpose of his duties, and in the course of his employment he had the misfortune to be knocked down by a tramcar and killed. Did the accident arise out of his employment? In my judgment it did. I agree that it might have happened to a man who was not a canvasser and collector, but this man was by his employment specially exposed to that danger. There was no evidence that he was not an expert rider. If the county court judge had found that it was the first time he had gone on a

C. A. 1911

PIERCE v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED.

Buckley L.J.

bicycle, and that he had thrown himself into danger and been knocked down, there would have been plenty of room for saying that the accident did not arise out of his employment but through his own incapacity, but the learned county court judge has found nothing of the kind. In these circumstances I think that the deceased met his death from an accident arising out of his employment. I am therefore of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Hamlin, Grammer & Hamlin, for Moore & Son, Birkenhead.*

Solicitors for respondents: *Jaques & Co., for J. H. Richardson, Bradford.*

H. B. H.

C. A. 1909 *Nov.* 9.

[IN THE COURT OF APPEAL.]

PROCTOR & SONS *v.* ROBINSON.

Employer and Workman—Compensation—Review—Reduction of Weekly Payments—Earning Capacity of Workman—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

Where, upon an application by employers to reduce the weekly compensation payable to a workman under the Workmen's Compensation Act, 1906, on the footing of total incapacity, it was proved that the man was prevented by the accident from doing the full work of an ordinary labourer, but that he could do some light work if he could obtain it, and there was no evidence that he could obtain any suitable employment:—

Held, that it was incumbent on the employers to shew what particular light work the workman could do and to give some evidence that he had a chance of obtaining that particular kind of work, and that in the absence of that evidence reduction ought to be refused.

APPEAL from an award of the judge of the Derby County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On July 16, 1908, Robinson, a lime-washer, while working for Edward Proctor & Sons, a firm of builders, sustained injuries to his left leg and ankle by the breaking of a ladder, and he was

paid 15*s.* a week compensation under a registered agreement on the basis of total incapacity.

On July 7, 1909, the employers applied for a diminution of this weekly payment on the ground that the respondent was not then totally incapacitated for work as the result of the accident. The respondent by his answer alleged (1.) that he was unable to follow his occupation as a lime-washer and was unable to earn any weekly wage in some suitable employment or business by reason of the injuries sustained by the accident; (2.) that if he was not now totally incapacitated for work as the result of the accident his average weekly earnings could by reason of his injuries be only very small and of a very irregular character.

At the hearing of the application two surgeons were called on each side. All the witnesses agreed that the respondent was suffering from permanent flat foot and that he was not fit to work on ladders or scaffolding, but the applicants' witnesses were of opinion that he could do ordinary work on the flat. The respondent's witnesses, on the other hand, stated that he could do some light work only; that he could not dig, but that he could do any work which did not involve long standing or much walking or stooping or lifting heavy weights. One of the witnesses added that he could not say what work would be suitable for the respondent, and the other said that the respondent could not earn his living as an ordinary labourer. The respondent also gave evidence. He said that he had not tried to get any job because he could not do his usual work. He did not think that he could do labouring work; nobody would employ him.

The county court judge refused the application, and his reasons for that refusal were as follows: "I found that he (the respondent) was now suffering from bad flat foot (left foot) as the result of the accident and that this prevented him from following his ordinary employment or from doing the full work of an ordinary labourer or able-bodied man. I held as a fact that he could do some light work if he could obtain it, but in the absence of any evidence that he could obtain such light work as he could do, I did not consider I ought to find as a fact that he could obtain it. I directed myself that incapacity to obtain work as a result of the accident was sufficient to entitle him to

C. A. 1909

PROCTOR & SONS v. ROBINSON.

compensation and that as the employers were asking to have the compensation diminished and the man was still partially incapacitated as the result of the accident it was incumbent on them to adduce some evidence of his capacity to obtain some work which he could do."

The applicants appealed.

Shakespeare, for the appellants. This appeal raises a very serious question, namely, whether when a workman has only partially recovered from the effects of an accident the employer is bound either to find him suitable employment or to go on paying him compensation on the footing of total incapacity. The county court judge has held that the employer is so bound. That decision is fraught with most serious consequences to the industrial world, for it follows from it that a workman who has ceased to be totally incapacitated may sit down and make no effort to get work and may yet go on claiming full compensation. The question turns upon the meaning of "able to earn" in par. 3 of the First Schedule. It may be that earning capacity involves not only the capacity of doing the work but also the opportunity of getting it, but it cannot have been the intention of the Legislature in cases of partial incapacity to throw the whole of the burden of finding suitable work upon the employer. Proof by the employer of the cessation of total incapacity raises a prima facie case that the workman is able to earn something and throws upon the workman the obligation of making reasonable efforts to obtain work. *Clark* v. *Gas Light and Coke Co.* (1) is distinguishable because it was there found that the workman had in good faith made reasonable efforts to get such work as he was capable of doing. Here it is found that the workman is capable of doing some light work, and it is admitted by his answer that he has some earning capacity if he chose to apply for work.

Lindley, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an appeal from an award of a county court judge refusing to diminish the weekly payment of

(1) (1905) 21 Times L. R. 184.

compensation paid by the employers to the workman. It was opened by the appellants' counsel as raising a very important question, namely, whether there is an obligation on an employer to find light work, or, to use the words of the Act, suitable employment, for a man who has partially but not entirely recovered from his injuries—whether the man is entitled to say "You must pay me full compensation until you find me suitable light employment." It is quite clear that the workman cannot claim full compensation until the employer finds him some other work, but that was not the question which the county court judge had to decide. Here there was an admitted accident. Compensation was settled by agreement at 15*s.* a week from July, 1908. Then, after the man had been paid this sum for twelve months, the question arose whether the man had so far recovered as to justify an application by the employers to reduce the weekly payments. It was not suggested that the man had fully recovered. But the employers sought a diminution of the payments on the ground that the workman was not then totally incapacitated from work. Medical evidence was called on both sides and there was some conflict of evidence as to the extent of the man's incapacity. The county court judge acceded to the contention of the employers to this extent. He said "I held as a fact that he (the respondent) could do some light work if he could obtain it, but," he went on to say, "in the absence of any evidence that he could obtain such light work as he could do I did not consider I ought to find as a fact that he could obtain it." He also found that he was suffering from bad flat foot as the result of the accident and that this prevented him from following his ordinary employment or from doing the full work of an ordinary labourer or able-bodied man. [The Master of the Rolls read par. 3 of Sched. I. of the Act.] As I have said, there was this conflict of evidence as to the man's condition and no particular kind of work was specified in the evidence as work which the man could do. There is no finding by the judge as to any particular employment which the man could do. He says "he could do some light work, if he could obtain it." There was not a particle of evidence on the part of the employers as to the chance which the man had

C. A. 1909

PROCTOR & SONS v. ROBINSON.

Cozens-Hardy M.R.

of obtaining suitable employment or as to the amount of wages which he could earn in any kind of employment. There were no materials before the county court judge to enable him to make any diminution. The argument addressed to us is this, that in a bona fide contested case the order ought to be made unless the workman can say "I have applied for light work and have not been able to obtain it." I think the employers here have struck too soon. They must first establish what particular kind of light work the workman is able to perform and must follow that up either by proving that they have offered him that particular kind of light work or by giving some evidence that there is a chance of his obtaining that particular kind of work in the district if he applies for it. In my opinion the employers here have failed to prove the case they have put forward. The burden rests on them and they have failed to discharge it. I think that the decision of the county court judge was right and that this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The point may be put shortly. The appellants here were the employers, who were applying for a reduction of the amount of compensation which the workman was receiving from them. They had therefore not only to establish a right to reduce the compensation but to put the Court in a position to determine the amount by which it should be reduced. They succeeded in obtaining a finding from the county court judge that the workman was able to do some light work—a vague phrase to which I think the learned judge attached no very definite meaning. They adduced no evidence that he was able to do any obtainable work nor any evidence as to his wage-earning capacity in the condition in which he then was. I think that the decision of the county court judge was right and that this appeal should be dismissed.

FARWELL L.J. I am of the same opinion. The employers had to prove a cessation of total incapacity on the part of the workman. That they have succeeded in doing. Then they had to shew what he was earning or capable of earning. It was not suggested here that the workman was earning anything, and the

county court judge has found that there was no evidence of his capacity to obtain such light work as he could do. They have failed to prove what he could earn or that he could obtain suitable employment in his present condition.

C. A. 1909 PROCTOR & SONS v. ROBINSON.

Appeal dismissed.

Solicitors for appellants: *William Hurd & Sons, for Williams, Berryman & Snook, Nottingham.*

Solicitors for respondent: *Fox & Manning, Nottingham.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1911 *Feb.* 23; *March* 18.

CARDIFF CORPORATION *v.* HALL.

Employer and Workman — Compensation — Review — Reduction of Weekly Payments — Earning Capacity of Workman — Failure to obtain Work — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 3, 16.

Where, upon an application by employers for a reduction of the compensation awarded to a driver in their employ on the footing of total incapacity, it was proved (1.) that the workman, though unable to resume his occupation of driver, was able to do any form of light work, (2.) that he had applied for various forms of light work without success:—

Held (Cozens-Hardy M.R. dissenting), that it was competent to the county court judge to find that the circumstances had so altered as to justify a reduction.

Clark v. *Gas Light and Coke Co.*, (1905) 7 W. C. C. 119, and *Proctor & Sons* v. *Robinson*, ante, p. 1004, explained and distinguished.

Per Buckley L.J.: Inability to earn, for the purposes of Sched. I., par. 3, of the Workmen's Compensation Act, 1906, is inability to get employment owing to some incapacity for work (see Sched. I., par. 1 (*b*)) personal to the workman, to the exclusion of inability to get employment owing to the state of the labour market, and this construction applies to an application to review as well as to an original application for compensation. Consequently, proof that a workman has made repeated and unsuccessful efforts to obtain suitable employment does not of itself establish a right to compensation on the basis of total incapacity.

APPEAL from an award of the judge of the Cardiff County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

C. A.
1911

CARDIFF CORPORATION v. HALL.

In 1904 Osborne Hall, while working as an assistant overhead wireman on the tramways of the Cardiff Corporation, fell from the top of a car and injured his right arm, and he obtained compensation from the corporation. The corporation then employed him as a driver of a horse and trap, and on July 1, 1908, he met with a second accident.

The following statement of facts is taken from the judgment of Fletcher Moulton L.J. Hall was driving a trap in the course of his employment and was thrown out of it, injuring his left arm and apparently receiving a severe shock. He duly applied to his employers for compensation, and they paid him full wages for six weeks after the accident and afterwards the full compensation of half wages until September 24, 1908, when they ceased to make any payment. On May 28, 1909, he made an application under the Workmen's Compensation Act, alleging total incapacity and claiming 9*s.* 2*d.* a week (i.e., half his previous wages) from September 24, 1908. The medical evidence at the hearing was very conflicting, and the learned judge called in the medical referee, who reported "that there is very considerable loss of power in his upper extremities with many other evidences of serious disease of the nervous system and that it is quite uncertain if these conditions will pass away or improve. He is at present absolutely unfit to follow his occupation of driving a horse and all he is fit to do is such work as a watchman, which would require no muscular power in his arms." On this report the county court judge on August 13, 1909, awarded full compensation of 9*s.* 2*d.* per week from September 24, 1908. On September 13, 1910, the employers applied to the county court to review the above award, claiming a termination or alternatively a diminution of the weekly payments ordered thereby. This application came on for hearing on October 8, 1910. By arrangement only one medical witness was called on each side. Their evidence was conflicting. Dr. Sheen, who was called for the employers, said that there was nothing the matter with the workman. There was a slight swelling in the left wrist, but it was not sufficient to prevent him doing his work, and the general effect of his evidence was that the workman was a malingerer. On the other hand, Dr. Wallace, who was called for

the workman, gave evidence to the effect that he was not able to do the work that he was doing before the accident and that he was suffering from traumatic neurasthenia. The workman also gave evidence and, in addition to deposing that he could not do his former work, proved that he had without success made nine applications for work in delivering bills, three or more for employment as a watchman, and one for employment as a postman. He was not cross-examined as to these applications for work. In view of this conflict of evidence the learned judge again called in the same medical referee as before and he reported as follows: "that Osborne Hall is suffering from impacted dislocation of the bones of the left carpus, the result of injuries received by him on the 1st day of July, 1908. This condition greatly weakens the grasp of the left hand and quite incapacitates him from driving a horse and trap in the usual manner of holding the rein in his left hand. It is, however, conceivable that he might learn to hold the reins in his right hand, in which case he might possibly be able to resume his occupation as a driver. Osborne Hall is now quite able to do any form of light work, more particularly such as would require principally the use of the right hand." On this evidence and the report of the medical referee the learned judge reduced the weekly payments from 9*s.* 2*d.* to 8*s.* and the note which he gave of the ground of his award was as follows: "I was of opinion that the condition of the respondent had greatly improved since the making of the award which it was sought to review and that there had consequently been such a change of circumstances as entitled me to review the weekly payments ordered by that award; and taking all the circumstances into consideration I came to the conclusion that 8*s.* a week was a proper and sufficient weekly payment to be made to the respondent by the applicants thenceforward in respect of the incapacity from which he was suffering."

The workman appealed.

Atkin, K.C., and *Albert Parsons*, for the appellant. Where a workman has partially recovered from an accident and the employer applies for a reduction of compensation the onus is

C. A. 1911

CARDIFF CORPORATION v. HALL.

on the employer to shew that the workman has a chance of obtaining the work for which he is suited.

[BUCKLEY L.J. Is your proposition that the state of the labour market has nothing to do with an original application for compensation but has a bearing upon an application to reduce the compensation?]

The onus is not the same in the two cases, for in the latter case the workman already has an award in his favour, but to a certain extent the state of the labour market always comes into consideration. Where the workman has completely recovered he is outside the Act altogether, but in the case of a partial recovery the authorities shew that regard must be had to circumstances other than the mere physical capacity for earning. There is here no suggestion that the appellant has not honestly attempted to get light work, and in the circumstances there was no evidence to justify the county court judge in making any reduction. *Proctor & Sons* v. *Robinson* (1) and *Clark* v. *Gas Light and Coke Co.* (2) completely cover this case.

Sankey, K.C., and *Ivor Bowen*, for the respondents. In *Proctor & Sons* v. *Robinson* (1) the workman was incapacitated by the accident from ordinary employment and the finding there was that he could do some light work only. Here the finding is that the man can do any form of light work. That is a material distinction. *Radcliffe* v. *Pacific Steam Navigation Co.* (3) shews that the issue is the same upon an application to review as upon an original application. There was ample evidence here to justify the learned county court judge in making the slight reduction which he did make since he may well have thought that the appellant's endeavours to get work did not exhaust the possibilities of the light labour market.

Albert Parsons in reply. *Radcliffe* v. *Pacific Steam Navigation Co.* (3) shews that, upon an application to review, physical capacity to earn is not the sole criterion.

Cur. adv. vult.

(1) 3 B. W. C. C. 41; since reported ante, p. 1004.

(2) 7 W. C. C. 119; 21 Times L. R. 184.

(3) [1910] 1 K. B. 685.

C. A. 1911

CARDIFF CORPORATION v. HALL.

March 18. COZENS-HARDY M.R. This appeal raises a curious and important question. Hall met with an accident while in the service of the corporation. His right arm was injured by falling down from a considerable height. The liability to pay compensation was admitted and 9*s.* 2*d.* a week was paid. The corporation then found him different work, and he was employed to drive a cart; a task which he was able to perform, as his left arm was uninjured. While driving, he met with a second accident, being thrown out of the cart, and his left arm was seriously injured. On Hall's application in August, 1909, the corporation were ordered to pay him 9*s.* 2*d.* a week. It is plain that the effect of the second accident was to disable him from performing the work which he had undertaken. On September 13, 1910, the corporation applied to terminate or diminish the weekly payments.

The evidence brought before the county court judge, especially that of Dr. Vachell, the medical referee, who examined Hall under X rays, establishes that he is suffering from dislocation of the bones of the left carpus, the result of the injuries received by him on the occasion of the second accident. This incapacitates him from driving a horse and trap in the usual manner, but he is now quite able to do any form of light work, more particularly such as would require principally the use of the right hand. He has made numerous attempts to obtain light work as bill distributor, watchman, or postman. He was not challenged by cross-examination on this point, and there is no suggestion of malingering, nor is there any suggestion that there are other light employments which he might have applied for with success.

This state of facts raises the question whether an employer, admittedly liable to pay compensation for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work without either offering to provide such work, or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character.

In my opinion, apart from authority, this question should be

C. A. 1911

CARDIFF CORPORATION v. HALL.

Cozens-Hardy M.R.

answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured. It is not a case in which the effects of the original injury have completely disappeared so that the man is as capable as ever he was. In that case the employer, who does not guarantee the labour market, is free from all further liability.

In my opinion, two decisions in this Court, by which we are bound, confirm the view which I have above expressed. In *Clark* v. *Gas Light and Coke Co.* (1) it was held that if a man has unsuccessfully made reasonable efforts to obtain employment at work which he is physically capable of performing, he must be regarded as not able to earn anything. In that case the workman was a gasworks coal porter, and the county court judge found that he was not capable of earning wages as a gasworks coal porter, but that he was capable of earning wages as a gatekeeper, timekeeper, watchman, or in any other similar work where the full use of his hand was not required, but he also found that the man had made reasonable efforts to get such employment and had been unable to get it, and he refused to reduce the compensation. The employer appealed, but this Court dismissed the appeal. Collins M.R. said that the standard of compensation was the difference between the wages he was "able to earn" before the accident and the wages he was "able to earn" after the accident, and that if the applicant, after repeated attempts, could not find an opportunity of putting his diminished powers of working into operation, he was justified in saying that his compensation ought not to be reduced.

The recent case of *Proctor & Sons* v. *Robinson* (2) seems to me to be a clear and direct authority on the point. In that case the county court judge found as a fact that the man could do some light work if he could obtain it, but that in the absence of any evidence that he could obtain such light work the compensation ought not to be reduced, as it was incumbent on the employers to adduce some evidence of the man's ability to obtain some work which

(1) 7 W. C. C. 119; 21 Times L. R. 184. (2) Ante, p. 1004.

the man could do. The employers appealed, but we dismissed their appeal. I do not propose to read more than one passage from my own judgment: "Either they (the employers) should first obtain some work which the workman could do, and offer it to him, and give evidence of this, or else they should give evidence that there is some chance of the workman obtaining a particular kind of light work in the district. Here the employers failed to prove the case they put forward. The burden was upon them and they have failed to discharge it."

Now the present case seems to me far stronger than *Proctor's Case* (1), for not only have the employers failed to adduce any evidence that light work can be obtained by the workman, but the workman has given affirmative evidence that his reasonable and repeated efforts to obtain such work have been unsuccessful. The learned county court judge held that the condition of the man had greatly improved since 1908, and that there was such a change of circumstances as entitled him to review the weekly payments, and he came to the conclusion that 8*s*. a week was a proper and sufficient weekly payment to be made to the applicant. The learned county court judge does not seem to have considered the question of the man's ability to procure light work.

For the reasons above stated, I think that his award ought not to stand, and that this appeal should be allowed. But as the other members of the Court are of a different opinion, the appeal will be dismissed.

FLETCHER MOULTON L.J. To appreciate the very important legal point involved in the present appeal it is desirable to describe briefly the proceedings in the arbitration. [The Lord Justice stated the facts as above, and continued.] It is beyond contest that there was abundant evidence justifying a review of the former award. But the appellant contends, first, that there was no evidence as to the amount by which the weekly payments ought to be reduced, and, secondly, that before such a reduction could be made the present respondents must shew not only that the workman was capable of doing work, but that he could actually obtain suitable employment. To my mind the first of these

(1) Ante, p. 1004.

C. A. 1911

CARDIFF CORPORATION v. HALL.

Fletcher Moulton L.J.

contentions merits little consideration. The workman was in receipt of payments on the basis of total incapacity. The contention of the employers was that the incapacity had practically ceased, and although they were unable to convince the county court judge that this was the case they proved to his satisfaction that a great improvement had taken place and that the incapacity was only partial and even slight. It is impossible to say that upon such evidence the county court judge was not entitled to form an estimate of the reduction to be made in the weekly payments, using his own common sense and knowledge of the world of labour. He is not in a different position in this respect from that in which a jury would be which had to estimate the damages, say, in respect of an accident. It is impossible to give mathematical demonstration of the proper quantum. Much must be left to the discretion of the tribunal acting on the evidence before it, and in the present case the reduction is so moderate that the decision appears to me to have been a most favourable one to the workman, the reduction in respect of the improvement in his condition being only 1*s.* 2*d.* per week.

The main contention of counsel for the appellant related to the second point. He relied primarily on the fact that this is an employer's application to review an award and rightly pointed out that in such a case the onus of proof rests on the party seeking to vary the award. This was not contested by his opponents, but they in their turn pointed out that there was abundant evidence that the condition of the workman had been very substantially changed for the better and that this evidence had been accepted by the judge. The basis, therefore, of the original award was gone, and the judge was entitled on all the evidence before him to make an award suitable to the present conditions. In answer the appellant put forward an alleged principle of law which it was contended had been laid down by this Court in *Clark* v. *Gaslight and Coke Co.* (1), *Proctor & Sons* v. *Robinson* (2), and *Radcliffe* v. *Pacific Steam Navigation Co.* (3), to the effect that where partial incapacity has been caused by an accident the employers are bound to shew not only that the workman is

(1) 7 W. C. C. 119; 21 Times L. R. 184.

(2) Ante, p. 1004.

(3) [1910] 1 K. B. 685.

capable of doing other work but that he is able to obtain it, and that otherwise he is entitled to an award as for total incapacity. If any such principle of law exists or is deducible from the decisions of this Court it must have a most important effect on the rights of parties under the Act, and I therefore propose to examine the question from the point of view of principle first and then to examine the decisions that have been cited in support of it to determine whether this contention of the appellant can be sustained.

Without dogmatizing on the extent to which the tribunal awarding compensation may take into consideration other circumstances, it may safely be said that the compensation given under the Act is primarily based on the diminution of the earning power of the workman by reason of the accident. Except in case of death the compensation takes the form of weekly payments during incapacity. It follows, therefore, that when the incapacity ceases the employer is entitled to be relieved of the obligation to make these payments. The diminution of earning power has ceased and with it has ceased the right to compensation. In the case of continuing incapacity it is equally clear that the payments depend on the diminution of earning power. By a practice which has almost passed into a definite rule the payments in a case of continuing total incapacity are equal to one half of the average weekly earnings of the workman at the date of the accident with a statutory maximum of 1*l.* per week. The earning power has become nil and therefore the compensation depends solely on his earning power before the accident. In the case of continued partial incapacity the statutory limit of such payments is the difference between the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or able to earn in some suitable employment or business after the accident, i.e., the diminution of earning power.

It is in this case that the difficulties of assessment arise. To ascertain the diminution of earning power the tribunal has to satisfy itself as to what the workman is earning or able to earn after the accident. The Courts soon realized that in such an inquiry evidence of the actual earnings of the workman after

C. A. 1911

CARDIFF CORPORATION v. HALL.

Fletcher Moulton L.J.

the accident was not necessarily a safe guide to the estimation of his earning power for this purpose even though no complaint could be made as to his readiness to accept work that was offered to him. They rightly interpreted the statute as referring only to the diminution of his earning power due to the accident. Unemployment, though following the accident, may not be due to it, but to slackness of trade. Suppose that a workman has recovered for the time being his full powers but can get no work by reason of the slackness of trade. It would be obviously unjust to make an employer liable in respect of such a lack of employment, which was not due to the accident. Liability to unemployment is a feature of all industrial labour, and the workman was subject to it before the accident as truly as he was afterwards. He has no right to be placed in a more favourable position in this respect than if the accident had not happened. Accordingly the Courts have held that a workman is not entitled to compensation for unemployment due to the fluctuations of trade, or, to use the language of the present Master of the Rolls in *Dobby* v. *Wilson, Pease & Co.* (1), "the employer does not guarantee the state of the labour market."

If the incapacity caused by the accident has practically ceased so that the workman is able for the time being to do his own work and a fit competitor for obtaining it there is no difficulty in applying this principle. In these circumstances if the workman cannot get employment it must be due to the fluctuations of the labour market and not to the consequences of the accident, and therefore the employer is entitled to be relieved from making the weekly payments. It is, however, no easy task to apply it in a case where partial incapacity still remains. By reason of this partial incapacity the workman may be unable to resume his old work and may be forced to take up something else for his livelihood. Or he may be able to pursue his old avocation earning lower wages. Or he may be able to earn his former wages at his own work when he can get employment but suffers from being one of those who will be the first to be discharged as soon as employment gets slack. Under these circumstances the results of the accident may affect his earning power either by increasing

(1) (1909) 2 B. W. C. C. 370.

the difficulty of obtaining employment or by diminishing the remuneration when it is obtained, or by both combined. Now the effect of the particular accident in diminishing the chance of obtaining employment is in many cases so personal a matter that it can only be arrived at by evidence as to the results of the efforts to obtain it. Such evidence is open to the objection that the difficulty of obtaining employment in the same or other trades may not be due solely to the effect of the accident but also partly to the state of the labour market. This consideration no doubt increases the difficulty of the tribunal in arriving at a right decision, but it does not affect the admissibility and in some cases the necessity of the evidence, and the tribunal must use all the material before it so as to separate as far as practicable that which is due to the one cause from that which is due to the other.

The practical form in which this has usually come before the Courts is the following. An award has been made on the basis of partial incapacity, evidence being given and accepted by the tribunal to the effect that the workman is capable of doing some other form of work than that upon which he has been employed prior to the accident or of doing his old work with certain disadvantages. After a time the workman has applied for a review and has adduced evidence to the effect that he has sought for such employment and has been unable to obtain it by reason of the continuing effects of the accident, and the Courts on being satisfied that they had been in error in supposing that it was possible for him to obtain the employment have varied the compensation accordingly. In such a case the employers can of course answer the claim to review by shewing that suitable work has in fact been offered to the workman either by themselves or by others and that he has refused it, but in the absence of such evidence the Court is greatly influenced by the proof of repeated and unsuccessful attempts on the part of the workman to obtain the suggested work. It goes far to demonstrate that the man's labour has become unmarketable. Counsel for the workman in the present case contend that such evidence if not rebutted is conclusive as to the workman being entitled to compensation on the basis of total incapacity.

C. A.
1911
CARDIFF CORPORATION v. HALL.
Fletcher Moulton L.J.

In my opinion this proposition goes too far and is not sound law. It is impossible to hold that the employer necessarily or generally guarantees the conditions of the labour market where there is partial incapacity any more than he guarantees that the workman shall get employment where incapacity has for the time ceased. An example will make this clear. Suppose that in the business of a mechanical fitter there is a class of work requiring a special fineness of touch or keenness of sight so that it can only be done by persons specially gifted in these respects and that it accordingly commands higher wages. Suppose also that an accident happens to one of these first-class fitters which injures his sight or touch to such an extent that he now has that sense only in an average degree of perfection, and thus is qualified only for the work of an ordinary fitter, but which does him no other injury. His position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more. I can see no reason why his chance of obtaining employment or his power of earning wages should be treated for any purpose as different from that of a man who has all his life been an average fitter, and, inasmuch as the employer does not guarantee the state of the labour market for one who is and has previously been an average fitter, I cannot see why he should guarantee the state of the labour market for the workman who has now become one. There can therefore be no general principle, i.e., a principle true in all cases, that in the case of partial incapacity the employer is required not only to shew what work the workman can do but also to shew that he can get such work. But on the other hand I am also of opinion that there are cases in which the onus of shewing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labour market—if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent

on the employer to shew that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must shew that a customer can be found who will take it. For in such a case we are not in truth dealing with fluctuations of the labour market at all. We are dealing with the chance of some one being found who can and will avail himself of the special residue of powers which has been left in the workman, and, seeing that it is the result of the accident that the workman has been made dependent on the finding of such a special employer, it is right that those who are liable to pay to him compensation for his loss of earning power should only be allowed to take credit for his partial capacity for work if they can shew that it can actually be made productive of remuneration to him.

Turning now to the authorities, it is unnecessary to quote any further cases in support of the proposition that the employer is not held to guarantee generally the state of the labour market. But the case of *Dobby* v. *Wilson, Pease & Co.* (1) which has already been referred to is worthy of a little further examination as it is an instructive case. The workman had injured one of his eyes whilst at work for his employers. After receiving compensation for a time he returned to work and his compensation was reduced. Owing to slackness of trade he was subsequently discharged and thereupon he applied for an increase of compensation and was awarded the full half wages. An appeal was brought from this decision and, the Court of Appeal coming to the conclusion that the county court judge had assumed that failure to get work was sufficient to justify his awarding to the workman full half wages as for total incapacity, the appeal was allowed and the case sent back to the county court judge to assess the compensation on proper lines. It will be seen that the effect of the injury had not passed away and yet the Court held that the employers were not bound to shew that the man could get work.

The case of *Radcliffe* v. *Pacific Steam Navigation Co.* (2) was

(1) 2 B. W. C. C. 370. (2) [1910] 1 K. B. 685.

C. A.
1911

CARDIFF CORPORATION v. HALL.

Fletcher Moulton L.J.

frequently referred to in the argument before us. The applicant Radcliffe was employed as butcher's mate on one of the respondents' vessels in 1907 and he met with an accident by which he lost one of his fingers, and he was awarded 15*s.* a week during incapacity. Nothing was paid under that award because he was thereupon taken back by the respondents at his old wages, but in December, 1908, he was discharged and continued to receive 15*s.* a week until May, 1909. His employers then applied for a review and obtained a reduction of the compensation to 1*s.* per week, the judge thinking that the man was capable of earning his ordinary wages but that his chances of obtaining employment were to some extent, though only slightly, diminished by the accident. Shortly afterwards he applied for a review. He produced evidence to shew that he had made repeated applications for employment in all likely quarters but had failed to obtain it because doctors would not pass him as fit for service on board ship as a butcher by reason of the loss of his finger. The county court judge raised the compensation to the former figure of 15*s.* a week and the Court of Appeal sustained his decision. There was no suggestion in this case that the applicant should do any other work than that of a ship's butcher. He had proved that by reason of the mutilation he was unable to obtain employment as such, or, in other words, that his labour was not merchantable in that branch of the labour market. He was therefore exactly in the condition that I have described, namely, that his capacity for work left him disqualified from obtaining employment in the only line in the labour market for which he was fitted. It follows, therefore, from the principles enunciated above that it lay upon the employers to shew that a man with such disqualifications could get suitable work before they could claim the benefit of any wage-earning power.

The workman in the case of *Clark* v. *Gas Light and Coke Co.* (1) had been a gasworks coal porter and in 1899 had lost four fingers of his left hand by an accident. The company, his employers, agreed to pay him full compensation of 1*l.* per week. In 1901 this was reduced to 14*s.* 9*d.* in consequence of the company offering him employment as a gateman and timekeeper at

(1) 7 W. C. C. 119; 21 Times L. R. 184.

27*s.* per week—an offer which he originally refused but subsequently accepted. After a time he was dismissed for misconduct and applied to the county court judge to increase the compensation. The application was refused, but more than a year later it was renewed, and the judge found on the evidence that he had made reasonable efforts to obtain such work as he was capable of performing and had failed, and he therefore increased the compensation to the former figure of 1*l.* per week. The Court of Appeal supported this decision. Here the county court judge had evidence that the mutilation left him physically fit for a narrow circle of occupations only and that he was unable to find work in any of them. It was quite open to him, therefore, to come to a similar conclusion to that arrived at in *Radcliffe's Case* (1), and if it was open to him to come to that conclusion the Court of Appeal could not interfere with his award. There is nothing in the only judgment in the case which is reported which is inconsistent with this interpretation of the decision. The Master of the Rolls, who delivered it, assents to the proposition that the fluctuations of the market ought not to be taken into consideration and dismisses the appeal substantially on the ground that it was competent to the county court judge to treat the incapacity produced by the accident and not the fluctuations of the labour market as the true cause of the inability to earn wages.

It will be seen that in each of these cases the county court judge had previously refused to increase the weekly payments although the applicant was out of work and it was not shewn affirmatively that he could obtain work, and there is no mark of disapprobation of these prior decisions in either of the judgments.

The only remaining case which it is necessary to notice is that of *Proctor & Sons* v. *Robinson*. (2) In this case the employers applied to reduce the weekly payments. The finding of the county court judge in this case must be looked at carefully to understand the decision. It is as follows: "I found that the workman was now suffering from bad flat foot (left foot) as the result of the accident, and that this prevented him from following

(1) [1910] 1 K. B. 685. (2) Ante, p. 1004.

C. A. 1911

CARDIFF CORPORATION v. HALL.

Fletcher Moulton L.J.

his ordinary employment or from doing the full work of an ordinary labourer or able-bodied man. I held as a fact that he could do some light work if he could obtain it, but in the absence of any evidence that he could obtain such light work as he could do, I did not consider I ought to find as a fact that he could obtain it. I directed myself that incapacity to obtain work as a result of the accident was sufficient to entitle him to compensation, and that as the employers were asking to have the compensation diminished, and the man was still partially incapacitated as the result of the accident, it was incumbent on them to adduce some evidence of his capacity to obtain some work which he could do." It will be seen that although the county court judge did not find that the incapacity was total he was of opinion that the workman could only do " some light work if he could obtain it," a phrase which in the context in which it appears I understand to mean that some special types of light work were within his powers, but only such. It was in this sense that it was interpreted by the members of the Court of Appeal. In the judgment of the present Master of the Rolls he says " No particular kind of work was specified which the man could do . . . . There was not a particle of evidence as to what that work would be." I was myself a member of the Court and in my judgment I say " They failed entirely to put forward any evidence that he was able to do any ordinary work." It was obviously competent to the county court judge to treat this as a case where the workman was left with a partial incapacity which rendered him a nondescript in the labour market so that it was incumbent on the employers to shew that it was possible to find persons willing to give wages for such labour as in his injured state he could perform.

In the authorities therefore I see nothing which conflicts with the conclusions to which in my opinion we are led by considerations of principle, and it only remains to consider whether in the present case the facts point to its lying on the one side of the line or the other. Here the medical referee finds that the workman is now quite able to do any form of light work, and this agrees with the evidence adduced on behalf of the employers. It was therefore competent for the county court judge to treat

this as a case in which there was no necessity for the employers to shew that the injured man could actually get employment because there was reliable evidence that his injury was not sufficient to prevent him doing any kind of light work. This is a well-recognized branch of labour, and his not being able actually to obtain employment in it might well be due to the fluctuations in the labour market. It is true that the workman gave evidence that he had made certain attempts to obtain employment but had been unsuccessful. We have been supplied with a list of these attempts, and it appears that with the exception of one application at the General Post Office for employment as a postman these applications were only for the post of watchman and for employment in delivering bills. It was competent for the county court judge to consider that such employments were only specimens of the work he could do, not the only kind of work within his powers, and therefore that such evidence was insufficient to outweigh the direct evidence that the workman could do any kind of light work. I do not say that it was not competent to him to come to an opposite conclusion, but if it was competent to him to take this view his award must stand.

As I am of opinion therefore that there was evidence before the county court judge on which he could properly find as he did, I am of opinion that this appeal should be dismissed with costs.

BUCKLEY L.J. In this case the employers applied on September 13, 1910, to review the award of 9*s.* 2*d.* a week made on August 13, 1909. The question is not, as the appellant suggested, a question as to where the onus of proof lies. The onus is certainly on the employer who applies for review. The question is not as to the onus of proof but as to the subject-matter for proof.

Sched. I., par. 3, of the Act of 1906 provides that, in fixing the amount of the weekly payment in the case of partial incapacity—i.e., partial incapacity for work, see Sched. I., par. 1 (*b*)—the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings before the accident and the average weekly amount which the

C. A. 1911

CARDIFF CORPORATION v. HALL.

Buckley L.J.

workman is earning or is able to earn in some suitable employment or business after the accident. The whole question in this case is as to what is meant by "able to earn." The provision as to review is par. 16 of Sched. I. No new measure is there fixed for determining the amount of the weekly payment. Whether upon the original arbitration or upon an application to review, the subject-matter for proof is (so far as the present matter is concerned) the same, namely, what is the average amount which the workman is earning or is able to earn.

Compensation is given by the Act for personal injury. (Sect. 1, sub-s. 1.) The injury contemplated is one which disables the workman from earning. (Sect. 1, sub-s. 2 (*a*).) The compensation is to be in accordance with the First Schedule. (Sect. 1, sub-s. 1.) The First Schedule gives compensation (where the workman survives) where the injury results in "incapacity for work." (Sched. I., par. 1 (*b*).) It is in the light of these provisions that the words "able to earn" in Sched. I., par. 3, are to be read. The workman is not entitled to compensation for every injurious result of the accident. He is entitled only to compensation for personal injury resulting in incapacity for work, and that compensation is to be ascertained as directed, including an ascertainment of the amount which he is earning or able to earn after the accident. It has been laid down that upon an original arbitration the state of the labour market is altogether outside the question of compensation: that the question is, not whether the man can in the then state of the labour market get a place, but whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place. The same in my opinion is true upon an application to review. Having regard to any incapacity for work personal to the workman arising from the injury, what is the difference between the amount of his average weekly earnings before and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident? This is the question to be answered. The two following propositions are of course distinct: First, that owing to incapacity for work arising from the accident the

condition of the workman is such that his labour is not saleable or is saleable only at a reduced figure, and, secondly, that his labour is saleable or is saleable at the same figure as before the accident but that he has failed to find a purchaser. The former and not the latter is the relevant proposition in the question of compensation. To express the same thing more briefly, inability to earn for the purposes of Sched. I., par. 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of "capacity for work," but he is not an insurer of a "right to work." The Workmen's Compensation Act is not a Right to Work Act.

It is difficult, no doubt, to draw the line. Physical incapacity is not necessarily alone to be considered. In some employments personal disfigurement may preclude employment when physical capacity is just as good as before. In such case personal disfigurement is an element to be taken into consideration. The circumstances under which labour can command employment in the market being all taken into consideration, the question is whether the accident has produced in the workman some incapacity for work personal to himself which prevents his obtaining employment. *Clark* v. *Gas Light and Coke Co.* (1) contains, in my opinion, nothing to the contrary of this proposition. Collins M.R. there expressly stated that fluctuations of the market ought not to be taken into consideration, that they were quite outside the question of compensation. He used the fact that the applicant after repeated applications could not get work as evidence merely to gauge his wage-earning capacity; as evidence whether or not his wage-earning capacity was the same as before or was such as that it was impossible to earn the same wages as before. The employer might have tendered but did not tender evidence the other way. The Court declined to interfere with the decision of the county court judge because there was evidence upon which he could find as he did. *Proctor & Sons* v. *Robinson* (2) again turned upon questions of evidence. The employers had given no evidence as to the man's earning

(1) 21 Times L. R. 184. (2) Ante, p. 1004.

C. A. 1911

CARDIFF CORPORATION v. HALL.

Buckley L.J.

capacity in the condition in which he was having regard to the accident. Both Fletcher Moulton and Farwell L.JJ. rested their decision on that ground. Neither, I think, affirmed the proposition that if there had been evidence that he had earning capacity he would have been able to assert inability to earn by reason of the fact that other applicants had succeeded in securing all vacancies in work of that class for which he had applied. The decision is not, I think, an authority for the proposition that in the case of an application to review there is to be paid to the condition of the labour market a regard which could not be paid to that circumstance if the application were an original application for compensation.

The facts here are that after certain evidence had been tendered before the judge the matter was sent to a medical referee who reported that "Osborne Hall is now quite able to do any form of light work—more particularly such as would require principally the use of the right hand." This is a complete finding of capacity for work such as described. Hall had made attempts in a number of directions to get work and had failed, but such failure was not by any evidence connected with the fact of the personal disqualification under which he stood by reason of the stiffness of the right arm and the weakness of the grip of the left hand. There was evidence of ability to earn qualified only by some evidence of difficulty in getting employment. Under these circumstances the judge could in my judgment rightly find as he did that the circumstances had so altered as that the weekly sum ought to be reduced, and he has reduced it. For these reasons I think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Watson, Sons & Room, for A. F. Hill, Cardiff.*

Solicitors for respondents: *Helder, Roberts & Co., for G. F. Forsdike, Cardiff.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1911
March 2, 18.

RILEY *v.* WILLIAM HOLLAND & SONS, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Termination of Employment—Application for Wages for past Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The applicant, who was employed at the respondents' mill, was discharged on a Wednesday. By the usage of the mill the wages were made up to Wednesday and were payable at the mill on Friday. The applicant went to the mill on the Friday for her wages, which were paid her, and, on going down the stairs of the mill, slipped and was injured:—

Held (Buckley L.J. dissenting), that the accident arose out of and in the course of her employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

Appeal from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The appellants carried on business as cotton spinners. By the usage of the mill wages were made up to Wednesday and were paid on Friday at the mill. Mrs. Riley was working at the mill as a "piecer" in the absence through illness of Mrs. Handley, a piecer. Her duty was to assist Oldham, who was a "minder." The minder engaged on behalf of the millowners the piecer, and received each Friday a sum which included his own wages and in addition the wages due to the piecer, whom he on behalf of the millowners paid at the mill on the Friday. It was the uniform practice of the piecers to call for wages on Friday afternoon at the mill. On Wednesday, July 6, 1910, Oldham told Mrs. Riley that Mrs. Handley would be back to work on the following morning. On Thursday and Friday Mrs. Riley applied at the mill for work, but there was no more work for her. On the afternoon of Friday, July 8, she went to the fifth floor of the mill to get her wages, which were paid her by Oldham, and on coming down the stairs she slipped and was injured. She applied for compensation.

The learned county court judge found that it was a practice

C. A. 1911

RILEY v. WILLIAM HOLLAND & SONS, LIMITED.

at the mill for piecers to call for their wages on Friday afternoon and that it was necessary for the applicant to do this at the time she met with the accident, and he held that the accident arose out of and in the course of the employment and awarded her compensation.

The employers appealed.

Adshead Elliott, for the appellants. There is nothing in the evidence to shew that the accident arose out of and in the course of the employment. When the employment has ceased the accident cannot arise in the course of the employment. At the date of the accident the only relation existing between the parties was that of debtor and creditor. At that date the appellants were not the employers and the respondent was not a workman within the meaning of the definitions in s. 13 of the Act, for according to the respondent's own evidence she was out of employment and there was no subsisting contract of service. The respondent's place had been taken by the woman for whom she had acted as substitute, and there cannot be two contracts of service at the same time in respect of the same employment. There was no obligation on the respondent to come for her wages on the Friday.

[COZENS-HARDY M.R. referred to *Cowler* v. *Moresby Coal Co., Ld.* (1)]

That was a case under the Employers' Liability Act and the man could not have got his wages without returning the tools which he had been using and which belonged to the employers. It was part of the terms of the employment that the tools should be given up.

[COZENS-HARDY M.R. referred to *Molloy* v. *South Wales Anthracite Colliery Co.* (2)]

There the man as part of his dismissal was ordered to get his tools and he must be allowed a reasonable time to get them off the premises. In *Lowry* v. *Sheffield Coal Co.* (3) and *Nelson* v. *Belfast Corporation* (4) the workman had not been discharged and there was a subsisting contract of service.

(1) (1885) 1 Times L. R. 575.
(2) (1910) 4 B. W. C. C. 65.
(3) (1907) 1 B. W. C. C. 1; 24 Times L. R. 142.
(4) (1908) 42 I. L. T. 223; 1 B. W. C. C. 158.

Ray, for the respondent. It was an implied term of the contract of service that the pay-day should be Friday and that piecers should go to the mill for their wages, and the county court judge has so found.

Adshead Elliott in reply.

Cur. adv. vult.

March 18. COZENS-HARDY M.R. The appellants are cotton spinners on a large scale. By the usage of the mill wages are made up to Wednesday, but are paid on Friday at the mill. Although as a general principle a debtor ought to go to his creditor and pay him, it is quite clear that this principle has no application to large employers of labour, who have a regular pay-day and a regular pay office. The implied contract in the present case was that the man or woman would work up to Wednesday, and would receive the wages due up to Wednesday on the following Friday at the mill. [The Master of the Rolls stated the facts as above set out, and continued:—]

I think it is a fallacy to assume that the "employment" ceases necessarily when actual work ceases. It includes going from the place of work and going to and from the pay office. In the words of Lord Cranworth in *Brydon* v. *Stewart* (1) we ought to "take a great latitude in the construction of the phrase 'being engaged in his employ.'" The contractual obligations of the employers were not terminated or satisfied until the wages due on Wednesday were paid on Friday. Mrs. Riley had not only permission to go to the mill on Friday to receive her wages, but it was her duty towards her employers to go to the mill and not to require them to search her out and pay her elsewhere. Though her employment was at an end on Wednesday night, in the sense that she had ceased to work under the contract, yet the employment continued because of the obligation of the employers to her arising out of the course of the employment and continuing until Friday afternoon: see the observations of Vaughan Williams L.J. in *Holness* v. *Mackay & Davis.* (2)

The point would be covered by authority if Mrs. Riley had

(1) (1855) 2 Macq. 30, at p. 35. (2) [1899] 2 Q. B. 319, at p. 326.

C. A. 1911

RILEY v. WILLIAM HOLLAND & SONS, LIMITED.

been actually at work on the Friday, although the wages which she went to receive had nothing to do with anything subsequent to the Wednesday: *Lowry* v. *Sheffield Coal Co.* (1); and I do not think there is any real distinction to be drawn.

In my opinion the decision of the learned county court judge was correct, and the appeal should be dismissed.

FLETCHER MOULTON L.J. The applicant in this case was working as a piecer in the respondents' mill. Her duty was to assist a minder, and it is the practice in such mills that the minder engages the piecer and pays her wages, but it is admitted that this is on behalf of the employers and that the piecer is in the employ of the respondents. A piecer receives her wages in the following way. Friday is pay-day at the mill, and the piecer's wages are paid to the minder for her and she goes to the minder on Friday afternoon at the mill to receive them. The learned county court judge specifically finds that this was the practice of the respondents and that it was necessary for the applicant so to go to the mill to collect her wages. In the present case the piecer was taking the place of one who had been sick. She worked up to the Wednesday, which is the day on which, by the custom of the mill, wages are made up. On the Thursday the piecer whose place she had taken came back to work, and consequently her own work ceased. She, however, had still to receive her wages, and it was in going on the mill to receive her wages for her past work in accordance with the practice that she fell down and received the injury. The county court judge has held that the accident arose out of and in the course of her employment, and I am of opinion that he was right in so holding.

Stripped of immaterial detail it is the case of a workman in an employment where wages are made up to Wednesday each week but the pay-day is Friday and who goes on the Friday in accordance with the contract to receive his wages for the past work. I will assume that his work at the mill has terminated on the Wednesday so that he is not actually working at the mill when he goes on the Friday to receive

(1) 1 B. W. C. C. 1; 24 Times L. R. 142.

his wages nor is proposing to work there in future. In my opinion the employment, though concluded on the Wednesday so far as work in the mill is concerned, implies and includes the visit on the Friday for the purpose of receiving the wages due. "In the course of the employment" does not mean "in the course of doing industrial work." Going to his working place on the master's premises or going from that working place at the cessation of work are both in the course of the employment though they are not part of the time when the worker is doing industrial work, and, seeing that the payment of the wages at such place and time as by settled practice between the employer and the workman have become contractual is a part of the contract of service, his going to fetch those wages in accordance with such contractual practice is just as much in the course of the employment as going to or coming from his work. It does not follow that employment has ceased when the industrial work of the workman has come to an end. Both the servant and the master may yet have duties to perform under the contract of employment which require the workman to come on the premises to enable them to be performed. So long as this is so the servant has the right and probably the duty to go on his master's premises in the contractual manner for such purposes. He does so in the course of his employment, and an accident which befalls him in his so doing arises out of and in the course of his employment. The decision of the county court judge was therefore correct.

I have dealt with the case on principle. But it is in my opinion concluded on authority. The identical question came before the Court in *Lowry* v. *Sheffield Coal Co.* (1) and was so decided. The distinction which counsel for the employers sought to make between that case and the present was that in *Lowry* v. *Sheffield Coal Co.* (1) the employment of the workman had not ceased on the Wednesday and therefore he was still in the employment of the same master. But in my opinion there is nothing in this distinction. The visit to receive the wages had nothing whatever to do with the continuance of the employment. It had reference solely to the employment down to the previous

(1) 1 B. W. C. C. 1; 24 Times L. R. 142.

C. A. 1911

RILEY v. WILLIAM HOLLAND & SONS, LIMITED.

Fletcher Moulton L.J.

Wednesday, and the workman's right and duty to present himself at that place and time to receive the wages for his work down to that Wednesday was unaffected in any way by the fact that he was still continuing in the employment of the same master for the purpose of doing industrial work.

I am therefore of opinion that apart from considerations of principle this case is concluded by authority and that the appeal should be dismissed with costs.

BUCKLEY L.J. Employment for the purposes of the Act exists only where there exist an employer and a workman bound contractually by a contract of service (ss. 1 and 13). There must be a relation of master and servant, a relation involving, so far as the servant is concerned, obligations of service, of obedience to reasonable commands, and the like. If there be no continuing obligation to serve, no continuing duty to obey, if the whole time of the alleged servant have become at his own disposal, if he be under no obligation to comply further with any order of the alleged master, the employment, I think, has come to an end. If the contract of service provide expressly or by custom that the servant shall during its currency do defined work for a defined time, and shall then do a defined act, e.g., attend at the factory and give up his master's tools, the employment will continue to exist until the last act contracted to be done has been performed. But when the last obligation of service to be rendered and accepted has been discharged and all that remains is a debt from the master to the servant for the wages of service, employment, I think, is over, and the only relation is that of debtor and creditor.

I am unable to agree that for the purposes of the Act employment continues until the wages of past service are paid. Suppose the employer becomes bankrupt or, being a corporation, is wound up. Suppose the workman assigns to another the amount due to him. In the former case, will he receive his wages from the trustee or the liquidator in the course of his employment? In the latter, if he goes to give notice of the assignment, will he be entitled to the benefit of the Act? In both cases I answer no.

Where employment is continuing, or is on the eve of expiration, many acts, such as going to or returning from work, are done in the course of the employment, and none the less because they are not done in the actual render of service. But where employment is at an end and the final act, such as giving up tools, or leaving the factory, is done, the Act, in my opinion, no longer applies.

In *Cowler* v. *Moresby Coal Co., Ld.* (1) the workman was not entitled to his wages until he had completed his work and brought up from the pit the tools with which he worked. The man was injured when performing the last duty he owed as servant, namely, bringing up his tools. In *Molloy* v. *South Wales Anthracite Colliery Co.* (2) the man came on Monday, May 2 (the first day after April 28 on which the colliery was at work), to resume his work. The manager then, on May 2, dismissed him and ordered him to fetch his tools. In so doing he was injured. The point is the same as that in *Cowler* v. *Moresby Coal Co., Ld.* (1) In *Lowry* v. *Sheffield Coal Co.* (3) and *Nelson* v. *Belfast Corporation* (4) the employment was a continuing employment. The question was not whether the employment was over, but whether the accident arose out of and in the course of an employment, which confessedly had not come to an end.

The facts here are that at the end of the day on July 6 the employment of Mrs. Riley came to an end. According to the practice which prevailed in the matter of her employment she called on the following Friday to receive her wages. She was under no obligation to go there on that day. She was at liberty to go but owed no duty to go. If she had obtained other employment and had been prevented from going no one could have complained. There would have been no breach of any obligation which she owed to any one. She would not have received her wages, and it may well be that according to the custom or practice found by the judge she could not have obtained her wages except by calling at the mill on the right day to receive them, but she was under no obligation to any one to do so. On

(1) 1 Times L. R. 575.
(2) 4 B. W. C. C. 65.
(3) 1 B. W. C. C. 1; 24 Times L. R. 142.
(4) 1 B. W. C. C. 158.

C. A. 1911

RILEY v. WILLIAM HOLLAND & SONS, LIMITED.

Buckley L.J.

Friday, July 8, she owed no duty of service, no duty of obedience, no duty of giving her time on that Friday to the person who had employed her up to and including the previous Wednesday. The relation of employer and workman had, I think, come wholly to an end on July 6, and there subsisted on the 8th no relation other than that of debtor and creditor. Under these circumstances I am of opinion that at the date when this accident happened there did not subsist between the applicant and the respondents the relation whose existence is a condition precedent to liability under the Act. For these reasons I think this appeal ought to be allowed.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for John Taylor, Blackburn.*

Solicitor for respondent: *J. D. Arthur, for A. E. W. Wragg, Manchester.*

H. B. H.

C. A. 1911 *Feb.* 27, 28.

[IN THE COURT OF APPEAL.]

ASTLEY *v.* R. EVANS & CO., LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Fatal Accident—Dependants—Evidence—Inference—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Per Cozens-Hardy M.R.: In considering what is sufficient evidence in a fatal accident to justify an inference that the accident has arisen "out of and in the course of the employment" a distinction must be drawn between cases where death occurs at a time when the workman is engaged in his employer's work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases on his own account.

Per Fletcher Moulton L.J.: Where the workman is engaged in his employer's work up to the time of his death, and the last acts known about him are consistent with the continuance of that work, the onus is on those who allege a cessation of his work for his employer, to prove it.

A brakesman in charge of a train that was running buffer to buffer with and pushing another train towards some siding points

endeavoured to climb from the truck in which he was riding on to the brake van of the first train, and in so doing fell and was killed. The points would have had to be operated by one of the brakesmen :—

Held (Buckley L.J. dissenting), that there was evidence from which the Court could infer that the accident arose "out of and in the course of the employment" and that the dependants were entitled to compensation.

APPEAL against an award of the judge of the county court of St. Helens upon a claim for compensation under the Workmen's Compensation Act, 1906, which raised the question whether the accident—a fatal one—arose "out of" the employment. The case is reported mainly for the observations of Cozens-Hardy M.R. and Fletcher Moulton L.J. as to the policy of the Act and the principle to be applied and the proper presumptions and inferences to be drawn from such evidence as can be obtained in cases of death by accident.

The applicant was the widow of a brakesman employed by the respondents, who were colliery proprietors. The evidence is stated and discussed in some detail in the judgments, but the facts were shortly as follows.

On September 24, 1910, James Astley, the deceased, was a brakesman of a train consisting of an engine pushing three trucks which were in advance of the engine. The deceased's train had overtaken another train consisting of an engine coupled to a brake van behind it. The two trains were not coupled; the foremost truck in which the deceased was riding was buffer to buffer with the brake van of the train ahead, in which another brakesman was riding. Both trains were going to the sidings for the night. The deceased's train had passed one set of points and, travelling at some eight miles an hour, would in two or three minutes reach another set of points where the train would have to stop, the lever be pulled over by the brakesman, and the train be brought back by the engine on to the branch siding. About this time the deceased was seen by the engine driver and fireman of his train to get out of the waggon in which he was riding on to the waggon buffer and try to climb into the brake van of the train in front of him; while straddle-legged on the back of the brake van he overbalanced himself, fell into the four-foot way, and was

C. A. 1911

ASTLEY v. R. EVANS & CO., LIMITED.

killed. The back of the brake van was some 3 feet 6 inches higher than the buffer of the truck.

The county court judge was of opinion that the accident arose out of and in the course of the deceased's employment, and drew the inference from what occurred that the deceased, when he met with the accident, was preparing to get down from his truck to attend to the points by the very dangerous way of first getting on to the brake van ahead, where he would have steps to the ground when the proper time arrived for him to alight, and he therefore awarded the applicant 191*l.* 4*s.* 10*d.* compensation, with costs.

The employers appealed. The appeal was heard on February 27 and 28.

Rigby Swift and *Rees*, for the appellants. It was no part of Astley's employment to leave his own train and climb into the other. With the two trains uncoupled this was obviously a very dangerous thing to do; it was unnecessary and did not arise "out of" the employment; he was therefore needlessly exposing himself to a risk which could not fairly be said to arise out of the employment: *Brice* v. *Edward Lloyd, Ld.* (1); *Pope* v. *Hill's Plymouth Co.* (2)

The onus is on the applicant to shew that the deceased met his death by something which arose out of the employment; that onus is not discharged by the evidence produced in this case: *Williams* v. *Wigan Coal and Iron Co., Ld.* (3) The deceased was trying to climb a train in motion, which it was no part of his duty to do, and it was dangerous; the lessening or increasing of the speed of either engine might have parted the two trains. The Court cannot conjecture; there must be some evidence from which a reasonable inference can be drawn.

The deceased may have been going for his own pleasure to speak to the other brakesman, which was no part of his employment, just as in *Reed* v. *Great Western Ry. Co.* (4)

This unexplained death on the line raises no presumption in

(1) [1909] 2 K. B. 804, 809.
(2) (1910) 3 Butterworth W. C. C. 339.
(3) (1909) 3 Butterworth W. C. C. 65.
(4) [1909] A. C. 31.

favour of the applicant: *Marshall* v. *Owners of Steamship Wild Rose*. (1)

Elias, for the respondent, the applicant. The deceased's duty as brakesman was to leave his own truck and get down to move the points. The deceased was only doing something that it was his duty to do: the fact that he did it in an unusual way by climbing into the brake van makes no difference: *McNicholas* v. *Dawson & Son*. (2) It was easier to get down from the brake van than from the truck, and the reasonable inference is that the deceased was climbing into the brake van in order by that means to get down the more readily when he reached the points. This was clearly within his employment.

Rigby Swift replied.

COZENS-HARDY M.R. This appeal, which has been most ably argued, raises a point which, not for the first time, has occasioned me a great deal of difficulty and serious doubt. Nothing is better established, not merely by reference to the language of the Act of Parliament but by an uninterrupted series of decisions upon the Act, that the accident in respect of which compensation is claimed must be one arising "out of and in the course of the employment," and it is equally well established that the burden of substantiating the claim against the employer rests upon the applicant. But having regard to the nature of the cases which come before the Courts under the Workmen's Compensation Act, we are constantly face to face with this difficulty: What is sufficient evidence to satisfy the obligation of the applicant to establish his case?

It is unfortunately true that there are many accidents, and fatal accidents, which admittedly arise in the course of the employment as to which there is no witness to tell the tale. The man is dead, his body is found mangled in machinery; nobody knows how it happened. Are the dependants of the workman to fail because they cannot prove that the accident happened while the man was doing something arising "out of" his employment in discharge of his duty towards his employer, or is the Court justified, and, if justified, is it bound, in a case like that, to draw

(1) [1909] 2 K. B. 46. (2) [1899] 1 Q. B. 773.

C. A. 1911

ASTLEY v. R. EVANS & Co., LIMITED.

Cozens-Hardy M R.

the inference—not conjecture, but to draw a legitimate inference—that there was no change or cessation of the work on the part of the workman, but that the Court should infer that although his conduct may have been irregular—may have amounted even to serious and wilful misconduct on his part—yet the accident is one which the Court ought to infer arose "out of and in the course of the employment"?

In accidents of this kind, where death has arisen, I think a line must be drawn between cases where the death occurred at a time when the man was engaged in his employer's work and cases where death occurred at a time when the man was free, without any breach of contract, to do what he was minded to do for his own pleasure. Many cases of accidents and death occurring on board ship have arisen in which there are dicta if not an actual decision which have almost decided this point. In those cases, if all you know is that a sailor actually on the watch falls overboard on a dark night, and you know nothing more about it, and no human being can say how it happened—it might have been while he was doing anything but what was his duty to the owner of the ship—yet the Court is justified in drawing the inference that the accident arose not merely "in the course of" the employment but "out of" the employment, whereas the Court would not be at liberty to draw such an inference if it was a case such as that of the cook in *Bender* v. *Owners of Steamship Zent* (1), who when not on duty went up from his kitchen below on to the deck and met with an accident there in circumstances which no one witnessed; in that case it was held that the burden of proof had not been discharged. I think that is a reasonable and not a difficult line of demarcation.

In the present case the facts are very peculiar. [Having stated the facts as to the composition of the two trains and that they were running buffer to buffer towards the points, his Lordship continued:—] The points to which they were coming would have involved, the two trains going slowly through the points, some one getting down from one of the two trains—there was no necessity for both to get down—to turn a lever in order that both trains might go back into the siding. All we know for a fact at

(1) [1909] 2 K. B. 41.

this time is that the man who was brakesman in the front train had turned the points at the previous junction shortly before the accident took place. After that (at the critical time) he was seen to be putting on his coat. He was seen to get his can and take his tea with his back to the door of the van. This of course was in full view of the deceased, for the truck on which he was was in immediate contiguity to the van, in actual physical contact, buffer to buffer, although not linked together by chains or any other means of that kind—a position which, of course, as counsel for the appellants have pointed out, was liable to be changed at any moment, either by the front train going ahead a little or by the one behind slackening, but for the time being they were physically in the position of one train, buffer to buffer. The deceased must have seen what the other brakesman was doing because the engine driver behind saw it. To my mind it is quite clear that it is a legitimate inference to draw from that that the brakesman in the front train was not intending to get off his brake to move the lever for the points which were distant some two minutes' run, because he would not have put his coat on then. He would not have got his can and be taking his tea if he had been about to jump off his van in such a short space of time to turn the lever and let both trains go back. And I think there are reasons why he should not do that, for it is said by one of the witnesses that it is the duty of the brakesman on the leading train, in such circumstances, to open the points, and although, while the two trains were going along the main road, Astley's train was the rear train, yet when the time came for moving the lever for the points the deceased's train became the leading train because it was going backwards. What the deceased was seen to do was this: [His Lordship stated the facts leading up to the accident and the finding of the county court judge, and continued:—] It is quite plain that it is much easier for a brakesman to get down from and up again to a train when he is in a brake van with steps than it is to get down and get up again from a mere truck where there are no such facilities as are furnished by the steps of the brake van. When you once draw the inference which I do, and I think legitimately, that it was the business of the deceased, according to the custom and

C. A. 1911

ASTLEY v. R. EVANS & CO., LIMITED.

Cozens-Hardy M.R.

courtesy as between brakesmen on these occasions, to get down and to work the lever in order that the two trains might go back into the siding, it seems to me this is really neither more nor less than a case in which the man in the endeavour to discharge his duty, namely, to get down and to work the points by a lever, did or endeavoured to do that duty by a method which was risky and dangerous, but which I should not myself be disposed to call serious and wilful misconduct on his part. I cannot see any ground for supposing that this was an act done by him for his own will and pleasure, or for any other purpose or motive than to discharge, in, it may have been, an improper mode, his duty as brakesman to the train, namely, the duty of getting off the train in two minutes' time by the most easy and safe method of doing that duty if he could have once got into the brake.

For those reasons, although I quite agree that this is a case which is very near the boundary line, and I say again it is a case which has given me a great deal of anxiety, upon the whole I think the decision of the learned county court judge was right, and that we ought not, having regard to the scheme and policy of the Act, to interfere with the view that he has taken, or to hold that the dependants are not entitled to the award he has made.

In my opinion this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, but as this case raises in a striking manner an important question of principle in the interpretation and application of the Workmen's Compensation Act, I propose to deal with it fully.

The policy of the Act is, I think, not difficult to ascertain. It was well known that workmen willingly enter employments which bring with them much greater dangers than does the ordinary course of life, and that they are willing to do so without any special arrangements as to compensation. It was felt that it was not fair either to the workmen or to society that they should be exposed to those dangers on the terms that if any accident happened to them they should be left incapable of supporting themselves and be thrown upon society for support. Accordingly the Act provided that compensation in such a case

should be a statutory term of all employments, and hence I conclude that the Act intended to cover broadly accidents to workmen in the course of their employment. Of course they must be accidents arising "out of" their employment. One can imagine an accident happening while a person is engaged in employment which arises from a totally external source. Such an accident as that was not intended to be covered, but I do not think for one moment that the Act intended to provide only for those accidents which arose during or out of the proper performance by the workman of his contract of service. On the contrary, I think that its justification largely lay in the following consideration: A man is put in a position where an act of negligence or an act of disobedience brings terrible consequences, and although he has no right to be negligent and no right to be disobedient, it is nevertheless injustice to him and an injustice to society (who will have to support him, if he is rendered incapable of working) that the whole consequences of his act should fall on him. It is therefore only fair that he should have compensation if he should yield to the temptation and suffer from the danger. That this is the spirit of the Act is put beyond doubt by the provision in s. 1, sub-s. 2 (c), that even serious and wilful misconduct shall not be a bar to compensation to the dependants in the case of death of a man, and to him himself in the case of serious and permanent disablement.

In all these cases, according to the natural, almost the necessary, requirement of legal proceedings, the person who is applying and claiming compensation must prove his case. Proving his case means that he has to put forward a case that, with all the fair presumptions which are to be made from the evidence which is given, would entitle him to compensation. There is one class of cases in which presumptions are of the greatest importance, and the decision often turns upon the right view as to the proper presumption to make. I refer to those cases where the workman has been killed. In many cases death must necessarily be instantaneous; in most cases it is impossible to get any evidence which can be produced at the hearing as to what occurred at the last moment. It is therefore from the circumstances immediately before the death that you can alone form any conclusion

C. A. 1911

ASTLEY v. R. EVANS & CO., LIMITED.

Fletcher Moulton L.J.

as to the manner and cause of the accident. Take for instance the case of a man who is working by himself, attending to dangerous machinery, who is found to have been dragged in and killed. It is impossible to know what was the last act of the deceased which caused him to be entangled in the machinery. In a case like that what is the proper presumption to draw? As I have already pointed out, negligence is no answer to the claim of the dependants, even disobedience is no answer, but if the man had ceased to be engaged in the master's work when the accident happened, then it would not or might not be in the course of his employment, and if the accident was not connected with the dangers to which he was exposed, but to dangers voluntarily sought by him, it might, even though it happened "in the course of," not arise "out of" the employment.

What then is the proper presumption in the case of death which is due to the dangers of the employment and which occurs to a person who is engaged in it, but where from the nature of the case no direct evidence can possibly be obtained as to the events immediately preceding the accident? In my opinion the principle that we ought to apply to the presumption in such a case is, that where the workman is shewn to have been engaged in his employer's work and nothing else during the period prior to the accident, and the accident occurs by reason of his doing an act which is consistent with his still continuing to be doing that work, the proper presumption is that he did what led to the accident in continuing his employer's work, and not that he had ceased to do his employer's work and had commenced to do something for his own purposes. In other words, where the workman is engaged in his employer's work up to his death and the last acts known are consistent with the continuance of that work, the onus is upon the person who alleges a cessation of his work for his employer, to prove it. Now I propose to apply that principle here. Let us see what the facts of the case are. [His Lordship stated them, and continued:—] I come to the conclusion that, as the other brakesman had opened the points because in passing through those points his train was leading, it would probably be the business of Astley to open the points which they were going to pass through

when his train would be leading. A brake van is a very easy thing to get down from, indeed it is specially made with facilities for getting down and getting up again, and I can see nothing in his going into that brake van at all inconsistent with his intending to do the next act which he had to do, namely, to get out and go to the points and open them. Therefore I find that Astley had been the whole day engaged in his employer's work and that he now at the last moment does an act which is quite consistent with his continuing that work, and, therefore, I come to the conclusion that he was continuing that work, until there is evidence to the contrary. This is an application of the principle enunciated above that the party who alleges that there was a cessation of doing his master's work under such circumstances, has the onus of proving it. If that be so, there is an end to the case.

The judgment of the county court judge is to the like effect. He has actually come to the conclusion that the act was done for the purpose of continuing the employer's work. In my opinion it is not necessary to go so far. If the facts are consistent with the continuance of the work and there is no evidence to shew any cessation or any intention to cease working for his employer, it is sufficient. [His Lordship then dealt with the argument as to the alleged recklessness of the deceased in getting from one train to the other while they were in motion, which his Lordship considered exaggerated and irrelevant to the present decision, and continued :—] Then it has been suggested that Astley might have done this for some other purpose; that he might have wanted to go and speak to the other brakesman. If I am right in my principle that where you allege a cessation of working for the employer, although the act is consistent with his working for him, you have to prove it, all those suggestions fall to the ground. I may add that I have no doubt myself that the view of the county court judge was in fact correct and that this act of the workman was in contemplation of the next thing that he would have to do in his master's employ and as a step towards it. Under those circumstances I am of opinion that this appeal should be dismissed.

C. A. 1911

ASTLEY v. R. EVANS & CO., LIMITED.

BUCKLEY L.J. In my opinion this appeal ought to be allowed. At the moment of the accident the position of affairs was this: [His Lordship stated the facts, and continued:—] Under those circumstances Astley's dependants make a claim, and it is for them to prove that this accident arose "out of and in the course of" his employment.

It has not been disputed before us that it arose in the course of his employment. He was there acting as brakesman; he was engaged in the employment; unless he had deviated for the moment therefrom for another purpose, he was in the course of his employment. The point we have heard argued was, did the accident arise "out of" his employment? I think very slight evidence might have been enough in the circumstances under which this accident occurred to satisfy the Court that the accident did arise "out of" his employment: at the same time I think the onus is on the claimants to give some evidence—by way of inference might be enough—to shew that the accident arose out of the employment. In my opinion there was none. On the contrary, I think that such evidence as there is was the other way. Two witnesses were called who saw the accident, the fireman and the driver of the train in which Astley was riding and to which he owed the duty of brakesman. The fireman's evidence describes the actions of the man in climbing from the waggon of his own train into the brake van of the other train, and states the fact that Astley was in charge of the train in which he was riding and the fact that the points which I have mentioned were about a quarter of a mile further off. That is the substance of his evidence. The most material evidence is that of the driver. I look at his evidence to see whether there is anything whatever here to shew that in the act he did Astley was doing anything in the interests of his master or the supposed interests of his master. The question to be asked is, to use the words of Lord Loreburn in *Reed* v. *Great Western Ry. Co.* (1), Was this man where he was not entitled to be, was he working or was he pleasing himself? As between those two things, whether he was working, or whether—as put in many of these cases—he was larking, I think it is for the

(1) [1909] A. C. 31, at p. 33.

claimants to give some evidence that he was doing the one and not the other. They have given none at all. The evidence I am going to refer to is the evidence of the engine driver. He describes what the man did and how he tried to climb and how he fell, and so forth, and then he says, "I do not know what his intentions were in doing it, he had never done it before," and "he had no reason for getting out for anything connected with our train." [Having discussed this evidence and the finding of the county court judge, his Lordship continued :—] The result is that I can find no evidence on which the judge could draw the inference he did. It seems to me that his inference is drawn contrary to the evidence adduced. The evidence is that there was no reason for Astley to get out of his own truck and get into the brake van. Prima facie his duty was to stand by his own brake in his own train. There is no evidence that for his master's purpose he ought to have left it. It appears to me there is evidence here which precluded the inference upon which the learned county court judge proceeded. I think not only did the claimants not adduce evidence that it arose out of, but I think evidence was adduced to shew that it did not arise out of, his employment.

For those reasons I think this appeal ought to be allowed, but as the other members of the Court are of a different opinion, the appeal will be dismissed.

Appeal dismissed.

Solicitors: *W. P. Ellen, for Peace & Darlington, Liverpool; H. B. Baines, for A. E. B. Griffin, St. Helens.*

W. C. D.

C. A.

1911

Feb. 28; *March* 18.

[IN THE COURT OF APPEAL.]

BALL *v.* WILLIAM HUNT & SONS, LIMITED.

Employer and Workman—Compensation—Incapacity for Work—Disfigurement—Loss of Earning Capacity—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I.* (1.) (*b*), (3.).

A workman, who had lost the sight of his left eye twelve years previously, met with an accident which necessitated the removal of his left eyeball: on his recovery from the operation he was unable to obtain work in consequence of his being manifestly a one-eyed man, though his capacity for work was exactly what it was before the accident:—

Held (Fletcher Moulton L.J. dissenting), that an injury which did not cause an incapacity for work, but only made patent to every one a pre-existing incapacity, did not entitle the workman to compensation.

Per Fletcher Moulton L.J.: "Incapacity for work" in Sched. I. (1.) (*b*) is not to be restricted to loss of physical power for doing work. It includes a case where the workman has by the accident lost the power of doing the work as a workman for wages; a workman therefore has brought himself within the Act when he shews that by reason of an accident arising out of and in the course of the employment he has sustained an injury which lessens his earning capacity, and this whether or not it has diminished his physical capacity for doing work.

Appeal against the refusal of the judge of the West Bromwich County Court to award compensation to an applicant under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a workman who was physically no worse off from an accident, though less able to obtain employment than before as the result of the accident, could obtain compensation for such loss of earning capacity.

The facts were that some fifteen years ago the applicant, an edge tool moulder, met with an accident through a piece of steel striking his left eye, with the result that three years afterwards this eye became blind, but it was not removed and to all appearances his eyes were normal, and he had for twelve years worked at his trade of an edge tool moulder with only one eye and had earned his old rate of wages. In September last, whilst cutting out some brickwork, preparatory to fixing a hammer, a piece of

brick struck the applicant's left eye and set up so much inflammation that this left eye had to be removed. Compensation at 10*s.* a week was paid for ten weeks until the applicant had recovered from the operation; he subsequently applied to his former employers, the respondents, and to several other firms for work, but they refused to employ him on account of the fact that he had only one eye. Application was then made for compensation under the Workmen's Compensation Act, 1906, for loss of wage-earning capacity.

The county court judge found in favour of the applicant that he had not full capacity to do the work of an edge tool moulder, but that such incapacity was not caused by the accident in September last, but by the accident which happened some fifteen years ago, and consequently he refused to award compensation.

The applicant appealed. The appeal was heard on February 28.

E. W. Cave, for the appellant. This workman's capacity to earn his usual wages has been seriously injured by this second accident. It is clear on the evidence that he cannot get employment at his former work as the result of this accident, because he is now manifestly a one-eyed man; he is just as capable, but employers will not have him. This incapacity for work or to obtain work was caused by the second injury to this eye very much as in *Martin* v. *Barnett*. (1) The accident has disclosed to employers the fact that the workman has a defect which before the last accident was not noticeable, therefore this left eye was of use to him as enabling him to obtain employment.

[BUCKLEY L.J. You mean that he can now no longer practise the deception of appearing as a two-eyed man.]

He was not bound to tell his employers that he had but one eye, so long as he was a capable workman, and for twelve years he has earned full wages though he had but one eye. His opportunity for finding employment has, as a fact, been narrowed in consequence of this accident, and he is entitled to be compensated for this loss of earning capacity: *Clark* v. *Gas Light and Coke Co.* (2)

(1) (1910) 3 Butterworth W. C. C. 146. (2) (1905) 21 Times L. R. 184.

C. A. 1911

BALL v. WILLIAM HUNT & SONS, LIMITED.

Shakespeare, for the respondents. Compensation is only payable for "incapacity for work" as the result of an injury by accident. The present injury has caused no "incapacity for work." The incapacity for work, if any, was caused by the accident which happened fifteen years ago. The Act only deals with accidents which disable a man from earning. The loss of the sight of this left eye is not the result of the last accident. The county court judge has found as a fact that the incapacity for work was not caused by the accident of September last. This finding must be accepted.

Cave in reply. "Incapacity for work" in Sched. I. (1.) (*b*) ought not to be restricted to mere loss of physical power: an injury which results in loss of earning capacity entitles a workman to compensation.

Cur. adv. vult.

March 18. COZENS-HARDY M.R. This appeal raises a very curious question. Does an accident which does not cause an incapacity, but only makes patent to every one a pre-existing incapacity, entitle a workman to compensation?

[After stating the facts and finding of the county court judge, his Lordship continued:—] In my opinion the decision of the learned county court judge was correct. Speaking generally, when an accident causes only disfigurement as distinct from incapacity, the case does not fall within the Act. But I desire to guard myself by saying that there may possibly be occupations of such an exceptional character that the possession of a comely and undisfigured face may be regarded as an essential qualification.

It may be that a parlourmaid whose face has been badly burnt could assert that she was "disabled from earning full wages," and that "incapacity for work" resulted from the accident, even after all the consequences of the burn, so far as physical powers are concerned, had disappeared. On that point I desire to keep an open mind. But the present case is quite different. The incapacity to work was in no sense due to the accident last September. At the utmost that accident only made obvious the existence of the prior incapacity. Ball is

neither more nor less capable than he was before September. I cannot hold the employers liable merely on the ground that he can no longer conceal his old defect.

The language of s. 1 (*b*) of the First Schedule shews that total or partial incapacity must result from the accident, and is in no way qualified by s. 3, which only provides that, where incapacity results from the injury, the man's ability to find suitable employment may be taken into account in fixing the amount of the weekly compensation. I have not overlooked the fact that compensation was paid for ten weeks until Ball had completely recovered from the effects of the removal of the eye, by which time such incapacity as resulted from the accident had ceased. Any liability of the employer to pay compensation therefore ceased. In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J., after stating the facts, continued :—I have no doubt, and I think it is clear that the county court judge had no doubt, that this difficulty in getting employment is in fact due to the loss of the eyeball, because employers probably think that the applicant cannot do the work with one eye as well as a man can who has two eyes. The county court judge, however, dismissed the application for compensation on the ground that the loss of the sight of this eye was due to the former accident, and that therefore as a matter of law he was bound to find that the incapacity was not caused by the accident in September last.

In my opinion this case raises in a very extreme form a question of the interpretation of the provisions of the Workmen's Compensation Act which is of great importance and of wide-reaching consequences. So much is this the case that it would be unfair to consider it in the first instance in the light of such exceptional facts as those of the present case. It must be decided as a general proposition before we consider whether those special facts bring this case within its operation.

Sect. 1 of the Act is as follows : "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall,

C. A. 1911

BALL v. WILLIAM HUNT & SONS, LIMITED.

Fletcher Moulton L.J.

subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of this Act." Sect. 1, therefore, gives the right to compensation, but leaves it to the First Schedule to settle the amount. The relevant part of the First Schedule enacts that the amount of the compensation under the Act "where total or partial incapacity for work results from the injury" shall be "a weekly payment during the incapacity" calculated in certain ways not material here.

The grave question to which I have referred is this: Do the words "incapacity for work" refer only to physical incapacity to do the work, or do they also include a case where the personal injury to the workman excludes him from his former employment and makes him incapable of obtaining work, though it would not make him incapable of doing that work if he could obtain it?

Let me give an illustration from domestic service. A parlourmaid is highly skilled and highly paid. Take the case of a parlourmaid who by reason of an accident is seriously disfigured in the face. Such a disfigurement is sufficient to preclude her entirely from obtaining a situation as a parlourmaid in the future. Her deftness of hand, her knowledge of her duties as parlourmaid, and her skill in the performance of them remain unchanged. But they have become practically useless because the accident has rendered her unsuitable for the employment, and therefore she cannot obtain any work. For the purpose of that particular employment she is totally incapacitated because unquestionably she is absolutely excluded from the employment by reason of the accident, and no more striking form of actual total incapacity can be given than total exclusion from the employment.

Many other cases could be given. An accident may leave a man slightly lame so that he walks with a limp insufficient to prevent his having sufficient activity to do all the work which he previously performed but quite sufficient to ensure his rejection if he applied for his old employment. One such case would be that of a footman, but many others could be found. Is it to be said that no compensation can be awarded because there is no loss of physical capacity to do the work on the impossible hypothesis of its being obtained?

In what precedes I have taken instances in which the workman's employment depends to some extent upon personal appearance. But the same principle applies where this is not the case. The question presents itself in its most serious form in the case where a workman has sustained a personal injury which is permanent but the effect of which upon his powers of work he has overcome by his own resolute efforts so that he is able to do his work as efficiently as before. Take the case of a man who has lost a finger by an accident arising out of and in the course of his employment and whose employment requires a firm grasp of his tools. His desire to earn his livelihood may have made him develop the powers of the injured hand so as to overcome the disadvantage under which he labours as compared with other men. He can in fact hold his tools as firmly as he did before. The physical incapacity has ceased. But he finds that he cannot get employers to believe that he has so far succeeded in this respect as to make himself as efficient as before. He therefore cannot get work.

If the word "incapacity" in the Act be restricted to loss of physical power of doing work the administration of the Act would be productive of the gravest injustice in such a case. Supposing such a man has done his best to get work, assuring the employers, but in vain, that he had overcome his disability. On an application for compensation he would be forced on cross-examination to admit that he had applied for work of the old kind, that he had stated that he could do it as well as ever, and that such statement was true. The opposing counsel would then turn triumphantly to the Court and say that the workman had put himself out of Court because he had admitted that incapacity had ceased. Yet all the while the workman might be unable to get employment by reason of the probably well justified disinclination of an employer to take an injured workman into his service in the belief that he would not be able to do his work properly. This does not imply that the employer would be unreasonable in so refusing. He might well say "Nine out of ten men in such a case would not be able to do the work as well as before. This man may be the exception, but I cannot run the risk." The workman would therefore be unable to get work or earn wages, and this loss of

C. A. 1911

BALL v. WILLIAM HUNT & SONS, LIMITED.

Fletcher Moulton L.J.

earning power would be the direct result of the personal injury due to the accident. Is the Act open to the reproach of being unable to give relief in such a case?

In my opinion the Act is not open to the reproach that it fails to meet such cases of destruction or diminution of earning power by reason of personal injury. In the phrase "incapacity for work" in Sched. I. (1.) the word "work" is used in the sense of doing work as a workman, i.e., for wages or other remuneration. It is to the capacity for earning wages as a workman that the whole scheme of the Act relates. It is beyond question that the amount of the compensation depends on the change produced in this, and, in my opinion, the right to receive compensation depends on it also. A capacity to do certain physical acts but not to do them as a workman for wages is not in my opinion a capacity to do that work within the meaning of the Act. It follows, therefore, that as a general principle a workman has brought himself within the Act when he shews that by reason of an accident arising out of and in the course of his employment he has sustained an injury which lessens his earning capacity, and this whether or not it has diminished his physical capacity for doing his work.

The workman in this case brings himself within the language of this general principle. Why should he not be entitled to the benefit of it? The only answer is that his obtaining employment prior to the second accident was due to his own wrongful act in concealing from his employers that he could only use one eye, and that to treat his power of lawfully earning wages as diminished by the second accident would be to enable him to reap advantage from his own wrong. This answer treats it as the duty of a workman applying for employment to reveal all his defects to his employer. In my opinion no such duty exists either legally or morally. "The workman warrants his skill" is a sound legal proposition, and a workman applying for skilled labour no doubt impliedly represents himself as fitted to perform it. But he makes no representation as to the way in which he attained or the means by which he retains such skill. His representation is only as to his possession of the skill, and not as to the disadvantages and even defects

under which he labours and which he has had to overcome in order to attain it.

In the vast industrial army no inconsiderable proportion are to be found who have been wounded and who have had to make great efforts to keep in rank with their comrades. If they can do so I know of no duty which requires that they should injure their prospects of obtaining employment by revealing their personal defects. If a master attaches so much importance to the unimpaired possession of any particular physical capacity, such as strong hand-grip, sound teeth, power of distinguishing colours, &c., it is for him to inquire of the workman as to his powers in such respects. If he does not do so, he leaves it to the workman to decide whether he possesses those qualities to such a degree as is necessary for the work, and, as I have said, all that the workman represents is that as an individual he is capable of doing the work which he seeks.

Viewed from this point of view the present case is a very strong one in favour of the workman. During the three years that followed the first accident, while the cataract was coming on, he continued to do his work as before, and, so far as appears, without any diminution of skill on his part and without any complaint from his masters. For the following twelve years, while he was totally blind of the left eye, he similarly continued to do this skilled work. He was perfectly justified, therefore, in holding himself out as capable of doing it, and so far from his previous employment being due to any wrongful or improper act on his part, I think that he is entirely blameless in the matter.

The consequences of the opposite doctrine would in my opinion be calamitous. Oculists tell us that a substantial number of persons practically use one eye only. The other eye is defective or more frequently has so different a focal length that the two cannot be used at the same time. Is it to be said that workmen thus handicapped are bound to announce themselves as being one-eyed in all employments where a master would have a preference for a two-eyed workman, which I think would include a very large proportion of the industrial occupations of the world? But the principle would not apply to eyesight only. If a workman has in the past injured a wrist or an ankle so as to leave it weak

C. A. 1911

BALL v. WILLIAM HUNT & SONS, LIMITED.

Fletcher Moulton L.J.

though, as he finds by experience, not so weak that he cannot do his work efficiently, is he to be held bound legally or morally to announce it with the almost certain effect of being relegated to the class of less desirable workmen? To give countenance to any such doctrine would in my opinion do widespread and lasting harm in the world of labour. It would grievously increase the burden of employers under the Workmen's Compensation Act. But, what is far worse, it would punish those who are courageous enough to struggle against physical difficulties and to make the best of the powers they possess.

I decline therefore to go beyond the principle that "the workman warrants his skill," and inasmuch as in this case the evidence shews that the workman was justified in so doing and thereby obtaining employment, and that by reason of the mutilation due to the second accident he can no longer obtain that employment, I see no reason why as a matter of law he should not receive compensation for this undoubted decrease in his earning power from the continuing effect of the injury for which the employers are admittedly liable under the Act. I am therefore of opinion that this appeal should be allowed and the case remitted to the county court judge to assess the compensation.

BUCKLEY L.J. More than twelve years ago this man lost the sight of his left eye. But the defect was not obvious. He was able to obtain employment upon the footing and in the belief that he enjoyed the sight of both eyes. He in fact obtained employment and did his work for twelve years with the use of one eye only. As the result of the recent accident the left eye has been removed. The defect is now obvious. In all other respects his capacity for work is exactly what it was before the recent accident. Is he within the Act suffering from "incapacity for work" (Sched. I. (1.) (*b*)) resulting from the accident? In my opinion he is not.

Personal disfigurement may in certain occupations give rise to a claim for compensation. The present is not a case of that kind. The workman's capacity and eligibility is by the recent accident unaltered. But a disqualification (if

it be a disqualification) which previously was not obvious has by the recent accident become obvious. The injury which he has sustained by the recent accident is that he has lost the chance of entering the service of an employer who is under the erroneous belief that he enjoys the sight of both eyes. The employer may be said to be an insurer of the workman against diminished capacity for work due to the accident. He is not an insurer against the workman suffering the loss of the advantage of bearing the appearance of having two eyes when in fact he has only one. The appeal must, I think, be dismissed with costs.

Appeal dismissed.

Solicitors: *Sharpe & Darby, West Bromwich; Tunbridge & Co., Birmingham.*

W. C. D.

LIVERPOOL CORPORATION *v.* CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

1911 *Jan.* 24, 25.

Poor Rate—Gathering Ground for Waterworks—Liability to Poor Rate—Part of Gathering Ground used as Plantations and Nurseries for young Trees—Rateable Value—Evidence of Price paid for Gathering Ground.

The appellants, who were owners and occupiers of a system of reservoirs and waterworks, bought the greater part of land which formed a gathering ground for their waterworks; the water which flowed naturally from the gathering ground being received into their reservoirs and waterworks. A portion of the land so bought (1165 acres in extent) consisted partly of agricultural land with farmhouses and buildings on it, and more largely of moorland. In order to reduce the population and the cattle on the 1165 acres and so diminish the risk of pollution of the water flowing therefrom, the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon and abolished certain rights of pasture and turbary which had previously been enjoyed thereon and limited the user thereof to purposes of sporting and afforestation.

They planted 297½ acres with trees for the purpose of improving the shooting and utilized 8½ acres as a nursery for young trees and enclosed the planted area in a ring fence. The remaining 859 acres was moorland already enclosed by a fence when the appellants bought it. They had made a few grips in the planted area for the purpose of

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the land to the waterworks of the appellants. Inside one of the plantations was a spring of water. In order to prevent the water therefrom from accumulating in the plantation it was conveyed by the appellants in a pipe through a portion of the plantation and along the side of a road to a trough which supplied water to a village outside any lands of the appellants. Any water not used to fill the trough flowed to the waterworks of the appellants. The sporting rights over the land were let by the appellants. The gamekeeper of the lessee with the authority of the appellants warned trespassers off the land. Since the purchase of the land by the appellants trespassers had been more rigorously excluded from the land than before:—

Held, that the appellants used and controlled the 1165 acres for the purpose of securing a water supply to their reservoirs and waterworks in a pure state and therefore were in beneficial occupation of the 859 acres of moorland so as to be liable to be assessed to the poor rate in respect of that land.

Judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 7, explained.

The rating authorities having elected to assess the land used as plantations and nurseries as a separate hereditament, and the appellants admitting that they were in rateable occupation of that land:—

Held, that that land ought to be assessed under s. 4 of the Rating Act, 1874, as being used for plantations and nurseries, and that the price paid by the appellants for the gathering ground was not admissible as evidence of the rateable value of the land so used.

CASE stated by justices of the Court of quarter sessions for the county of Lancaster.

The appellants, the Liverpool Corporation, were owners and occupiers of a system of reservoirs and waterworks known as the Rivington Waterworks.

They appealed to quarter sessions against a poor rate for the township of Withnell made on or about April 27, 1909. The only question on the appeal material to this report was as to an assessment in respect of land forming part of the gathering ground of the waterworks of the appellants.

The appellants in the first instance owned only the land occupied by their reservoirs and works, and by virtue of such ownership they received into their reservoirs and works the water which flowed naturally from the gathering ground, including that part of it in question in the appeal (1165 acres in area and hereinafter called "the said land.")

They feared that so long as the gathering ground was owned by persons other than themselves they might not be able to prevent pollution of the water flowing from it to their waterworks. They therefore bought the greater part of the gathering ground. The said land was bought by agreement at a price amounting to 26*l.* 10*s.* per acre. Other parts were subsequently bought by agreement or under compulsory powers at various prices, e.g., in one case 76*l.*, in another 409*l.* per acre, the average cost of the whole area of about 10,000 acres, including the said land, being 45*l.* per acre.

The general policy of the appellants with regard to the gathering ground was summed up in one of their reports in the following terms: "Any measures for preventing the pollution of the stream and reservoir must necessarily have for their object a considerable reduction in the resident population; and this can most advantageously be brought about by limiting the uses of the land to such purposes as sheep farming, forestry and sporting."

The said land when bought by the appellants consisted partly of agricultural land with farmhouses and buildings on it and more largely of moorland. In order to reduce the population and the cattle on the said land and so diminish the risk of pollution of the water flowing therefrom the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon and abolished certain rights of pasture and turbary which had previously been enjoyed thereon and limited the user thereof to purposes of sporting and afforestation in manner hereinafter appearing. As to 306 acres of the said land they planted 297½ acres of the said land with trees for the purpose of improving the shooting and utilized 8½ acres as a nursery for young trees and enclosed the planted area in a ring fence. The remainder of the said land, 859 acres, was moorland already enclosed by a fence when the appellants bought it. They made a few grips in the planted area for the purpose of adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the said land to the waterworks of the appellants.

Inside one of the plantations was a spring of water. In

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

order to prevent the water therefrom from accumulating in the plantation it was conveyed by the appellants in a pipe through a portion of the plantation and along the side of a road to a trough which supplied water to a village outside any lands of the appellants and so preserved the right of the inhabitants of the village to a supply from the spring. The trough was kept full by means of an automatic arrangement, and such water as was not used to fill the trough continued to flow to the waterworks of the appellants as it had done since the construction thereof.

The sporting rights over the said land and also certain other lands of the appellants were let by them under a lease dated March 16, 1906, for four years from December 11, 1905. By the lease the lessee for himself and his assigns covenanted with the appellants, their successors and assigns, (inter alia) that he the lessee "will at all times during the said term permit the corporation either by themselves their agents surveyors and workmen at any time to enter upon the said farms lands and moorlands for the purpose of thinning laying and cutting dykes (such dykes to be cut to the satisfaction of the lessee) carting cutting down and removing timber or poles collecting acorns cultivating or laying out the lands as new coverts nurseries or plantations constructing maintaining and examining rain gauges examining watercourses and for any other similar purpose whatsoever And will not do or cause or suffer to be done upon the farms and lands over which the right of shooting hereby demised is to be exercised any act whereby the waters in the reservoirs goits or works of the corporation or the streams discharging into the same shall or may be polluted discoloured or otherwise injuriously affected or whereby the works or property of the corporation may be injured And will from time to time and at all times during the said term permit the corporation to execute upon the said farms and lands any works for more effectually collecting carrying and preserving the purity of the waters flowing to upon or from the same directly or derivatively into the said reservoirs goits or works of the corporation the corporation making fair and proper compensation to the lessee for all loss damage or injury (if any) which he may sustain or incur by reason or in consequence of the execution of such works."

The lessee was rated in respect of the sporting rights.

The lessee's gamekeeper warned trespassers off the said land. In so doing he acted with the authority of the appellants. Since the purchase of the said land by the appellants trespassers had been more rigorously excluded from the said land than before. There was no evidence that pollution by trespassers was a material source of danger, and save as aforesaid there was no evidence that in warning off trespassers the lessee's gamekeeper acted as the agent of the appellants and for the purpose of preventing pollution. Save as aforesaid there was no evidence that the appellants had performed any outward acts of occupation on the said land.

It was admitted by the appellants that they were in rateable occupation of the 306 acres used by them for plantations and nurseries, but they contended that the plantations and nurseries were not made in order to increase and did not increase the profits from the waterworks and were rateable only at their value as plantations and nurseries under s. 4 of the Rating Act, 1874, and not on the basis of their having an enhanced value as a gathering ground for their water undertaking.

With regard to the remainder of the said land (859 acres consisting of moorland) the appellants contended: (1.) That the said land was unoccupied except so far as it was occupied by the sporting lessee, who was duly rated by the respondents in respect of such occupation. (2.) That prior to the acquisition of the said land by the appellants the water flowed therefrom naturally into the appellants' reservoirs, which were and are duly rated by the respondents, and that except so far as the ownership of the said land rendered it easier for the appellants to enforce the law for the prevention of pollution of the water and so maintain the value of the waterworks their position was in no way altered by the acquisition of the said land.

The respondents contended: (1.) That the appellants did not merely exercise the ordinary rights of an absentee owner in keeping trespassers off land of which he is not in rateable occupation; that the principal use and purpose of the land in question in the hands of the appellants was to supply water in a pure state to their reservoirs and that the appellants used and

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

controlled the said land for that purpose, and that if the appellants had not used and controlled the said land in the way they did, namely, by taking measures (or procuring that measures should be taken) to keep off trespassers and by leaving water to flow over the said land as far as possible in its natural condition and by the forces of nature, that purpose could not have been fulfilled; that there was occupation of the said land by the appellants similar to the occupation of a fruit tree when there is no fruit on it or of a hayfield while the grass is growing, and that the appellants secured the best value from the said land by the use they made of it. (2.) That the appellants were in rateable occupation of the said land by virtue of the springs, pipes, and grips in and upon the said land which conveyed water to the appellants' reservoir as described above, and that the laying of pipes and the erection or continuance of the fences mentioned above constituted evidence of rateable occupation. (3.) That the appellants' Rivington water undertaking should be treated as a whole, and that the appellants could not be held to be in occupation of some parts only of the property held and used by them for the purposes of the undertaking and to be not in occupation of other parts. (4.) With regard to the value of the said land the respondents contended (*a*) that the average price paid by the appellants for the whole of the gathering ground owned by them in connection with their Rivington water undertaking was the best evidence or at all events some evidence of the value of such ground; (*b*) that $3\frac{1}{2}$ per cent. on such average price was a fair and proper percentage to be taken to arrive at the rateable value; (*c*) that the main use in the hands of the appellants of the ground which the appellants had fenced in and planted was not for the purpose of plantations but for the purpose of supplying water, and that such ground should be assessed at its value as a water-bearing area with springs on it and not as land used only as a plantation or wood.

The Court of quarter sessions held:

1. That the appellants were not in rateable occupation of the said land with the exception of the parts used by them for plantations and nurseries.

2. That the plantations and nurseries should be assessed

under s. 4 of the Rating Act, 1874 (37 & 38 Vict. c. 54), at 2*s.* per acre and 15*s.* per acre respectively.

3. That the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for plantations and nurseries.

The questions for the opinion of the Court were whether on the evidence before them the decisions of the Court of quarter sessions were respectively right in law.

Danckwerts, K.C., Ryde, K.C., and *Gordon Hewart*, for the respondents. (1) An owner in fee of land who is in possession of it occupies it in law unless it can be shewn that some other person in fact occupies it. The appellants are therefore in occupation of this land. The whole and every part of the land is in the occupation of the appellants, and in arriving at its rateable value the rent the appellants themselves would have given for it as one of the hypothetical tenants must be taken into consideration. It is true that empty houses in possession of the freeholder are not considered as being rateable, but Blackburn J. in *Harter* v. *Salford Overseers* (2) expressed the opinion that that was an anomalous case. If an owner in fee of land intends to use it he is in rateable occupation of the land. The judgments in *Winstanley* v. *North Manchester Overseers* (3) shew that an owner in fee simple of land in possession is prima facie in occupation. In the present case the appellants instead of letting the land choose to use it as a gathering ground. In delivering judgment in *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.* (4) Lord Herschell L.C. said: "No doubt, if it could be shewn that the respondent company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement, and being owners they would, prima facie, be the occupiers; they would be so regarded unless the occupation were shewn to be in some one else." The intention of the owner must be considered, and when it is found that he does not allow any one else to occupy the land, the proper inference

(1) The terms "appellants" and "respondents" are used with reference to the position of the parties respectively before the Court of quarter sessions.

(2) (1865) 6 B. & S. 591.

(3) [1910] A. C. 7.

(4) [1895] A. C. 117.

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

is that he is in occupation of it: *Rex* v. *Corporation of London* (1); *Harter* v. *Salford Overseers* (2); *Staunton* v. *Powell* (3); *Rex* v. *Melladew* (4); *Borwick* v. *Southwark Corporation.* (5) The appellants are freeholders, they are in possession, they exclude all other persons, and they make use of the land. Therefore all the elements necessary to constitute rateable occupation exist: *Talargoch Mining Co.* v. *St. Asaph Union.* (6)

As to the amount at which the plantations and nurseries ought to be rated, the price the appellants paid for the gathering ground is an element in calculating the rateable value; it is admissible as evidence of the rateable value although the weight which ought to be given to that evidence is a pure question of fact: *Liverpool Corporation* v. *Llanfyllin Assessment Committee.* (7) *Great Central Railway* v. *Banbury Union* (8) does not apply. The decision in *Davies* v. *Seisdon Union* (9) is conclusive upon this question.

Balfour Browne, K.C., *Macmorran, K.C.*, and *Oulton*, for the appellants. An owner in fee simple who is in possession of the land is not necessarily in occupation of it; e.g., the owner of an empty house may be in possession of it and yet he does not necessarily occupy it: per Lush J. in *Reg.* v. *St. Pancras Assessment Committee.* (10) The authorities which have been cited on behalf of the respondents are distinguishable. In all those cases there were acts done which were evidence of occupation, e.g., putting furniture in a house. In the present case the appellants bought the land for the purpose of its being left unoccupied, although it is not disputed that they are in possession. The whole object with which they bought the land was to prevent it being occupied. No change has been made by them in the flow of water to the reservoirs. The water flows to them exactly as it did before the purchase of the land by the appellants. The appellants do not use the land in any way, although they may have

(1) (1790) 4 T. R. 21.
(2) 6 B. & S. 591.
(3) (1867) 15 W. R. 362.
(4) [1907] 1 K. B. 192.
(5) [1909] 1 K. B. 78.
(6) (1868) L. R. 3 Q. B. 478.
(7) [1899] 2 Q. B. 14.
(8) [1909] A. C. 78.
(9) [1908] A. C. 315.
(10) (1877) 2 Q. B. D. 581, at p. 588.

greater powers of protecting their reservoirs. They prevent any person making any use of the land: *Rex* v. *St. Luke's Hospital* (1); *East London Railway* v. *Whitechurch*. (2) A similar case would be where the owner and occupier of a house buys an adjacent house for the purpose of keeping it unoccupied in order to prevent noises and other nuisances to himself. It is clear that the owner would not be rateable in respect of the adjacent unoccupied house. The proposition enunciated by Lord Atkinson in *Winstanley* v. *North Manchester Overseers* (3) that "owners in possession are prima facie occupiers, unless it be shewn that the occupation is in some one else," is too wide. *Rex* v. *Melladew* (4) is distinguishable. In that case the warehouse was kept empty for the time being, but it was so kept with the object of being filled with goods to be stored in it. It was therefore occupied. The judgment in *Borwick* v. *Southwark Corporation* (5) was based upon the same principle.

The plantations and nurseries ought to be assessed under s. 4 of the Rating Act, 1874, and the price paid for the gathering ground is no evidence of their rateable value.

Danckwerts, K.C., in reply.

LORD ALVERSTONE C.J. This case raises questions of very considerable importance. [After stating the facts, his Lordship continued.] The first question argued before us was whether there was a rateable occupation of that which is called in the case stated by the justices "the said land" other than the parts of it used for plantations and nurseries. A large number of authorities were cited before us. I make no complaint of that, although they only support the one proposition stated in each with more or less particularity. As authorities I think they are all, or at any rate many of them, open to the criticism that there was on the facts of each case something which would justify the finding of occupation which has not been found in the present case. But that criticism does not apply to the whole of them viewing them as authorities in

(1) (1760) 2 Burr. 1053.
(2) (1874) L. R. 7 H. L. 81.
(3) [1910] A. C. 7.
(4) [1907] 1 K. B. 192.
(5) [1909] 1 K. B. 78.

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

Lord Alverstone C.J.

support of the main principle relied upon by counsel on behalf of the respondents, the assessment committee. That principle or proposition was that which it was said was enunciated by Lord Atkinson and recognized by Lord Loreburn L.C. in *Winstanley* v. *North Manchester Overseers* (1), that a person who is the owner of the land, and is in possession of it as owner, and who does not allow any one else to occupy it, must occupy it. Traces of that line of argument are undoubtedly to be found in the earlier cases to which our attention has been called; notably the passages in Blackburn J.'s observation and judgment in *Harter* v. *Salford Overseers* (2) with reference to its being difficult to understand why empty houses were not rated. Those passages do not of course amount to an authority, but they contain the statement that that particular incident, which is treated as existing, was anomalous or difficult to justify on principle. There is also the dictum or expression of opinion of Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (3), which certainly recognizes the proposition that if a house is left empty it is not the subject of rateable occupation. On behalf of the respondents Mr. Danckwerts has contended that the proposition laid down by Lord Atkinson in giving judgment in *Winstanley* v. *North Manchester Overseers* (1), that "owners in possession are prima facie occupiers, unless it be shewn that the occupation is in some one else," is to be understood in the literal and bald way in which it is there stated, and that it governs the present case, and that therefore the owner of land in possession of the land as owner, if he does not allow anybody else to occupy it, is in rateable occupation of it. Lord Atkinson's judgment continues: "In the first of these cases Lord Kenyon apparently considered that a person who had such possession of land as would enable him to bring an action of trespass must be held to be in occupation, unless it was proved that some other person was in occupation. It would, therefore, appear to me that this appellant is in "occupation" of this graveyard, despite any right of supervision or control which the churchwardens may be entitled to. Whether this occupation is a beneficial occupation—a thing of

(1) [1910] A. C. 7. (2) 6 B. & S. 591.
(3) 2 Q. B. D. 581, at p. 588.

value within the meaning of the statute of Elizabeth—or not depends upon whether the occupier is or is not by law debarred from deriving any benefit from it. If it is merely by his own volition, and not by the law, that he is deprived of a benefit which he might have received, then there is a 'potential beneficial occupation' and he is liable to be rated in respect of it." We are, of course, bound by that judgment and by that principle which is enunciated. I think it right to say, speaking for myself and considering the judgment for the first time, that if the House of Lords meant to lay down that any person who owns land must be the occupier, if there is no one else in occupation, the decision on further consideration may be found to go too far. My own view of the law of rating, which is not, of course, derived merely from the arguments in this case, is that an owner may be possessed of vacant land without being the occupier of it although no one else occupies it. For instance, we could at the present day apply this principle to vacant houses, the law as to vacant houses has been established for so many years that I do not believe it was intended to overrule the existing practice with regard to them, and yet, if the proposition maintained by Mr. Danckwerts be right, the anomaly which has existed for so long with regard to vacant houses must be taken to be put an end to by the judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers.* (1) I do not think that was intended. I do not wish to consider the judgments in *Winstanley* v. *North Manchester Overseers* (1) any further. I of course loyally accept the principle there laid down as far as it goes and intend to act upon it, but there are very many matters with regard to that case which I think prevent it being treated as containing an enunciation of a proposition with the wide effect for which Mr. Danckwerts has contended on behalf of the respondents.

But that does not dispose of the present case, because it seems to me that, applying the authorities which relate to the subject of beneficial use, it is quite impossible to say that there is no beneficial use by the appellants, the Liverpool Corporation, of this gathering ground in such a way

(1) [1910] A. C. 7.

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

Lord Alverstone C.J.

that they ought not, within the principle of *Holywell Union Assessment Committee* v. *Hallyn Drainage Co.* (1) and other cases, to be held to be beneficial occupiers for the purpose of rating. I think there is such a beneficial use clearly found in this case as precludes the appellants from saying "This is such waste land and so left empty that it is not to be considered the subject of rateable occupation by us the corporation." The fact is that to say land or property is left vacant or empty is not a conclusive test. That is shewn by the decision in *Rex* v. *Melladew* (2), where a building was left empty for the time being but was nevertheless held to be rateable. It is also shewn by the case of *Borwick* v. *Southwark Corporation* (3), where a firm had purchased a warehouse in order that they might transfer their business to the premises if it were necessary to do so, and (though I do not regard it as an authority) by *Overseers of Bootle* v. *Liverpool Warehousing Co.* (4), where leaving a warehouse empty in the circumstances of that case was found as a matter of fact to be sufficient to prevent the person being rated because he never intended to occupy during the rating year. But, in my judgment, you cannot answer the question by simply saying that it is the intention of the owner to leave land or a building vacant and it is in fact left vacant. Dealing with what may be called the user or occupation in the present case, let us consider what the facts shew. The property was fenced. Fencing of itself would not be conclusive. The farms are no longer allowed to be occupied. The water running to the reservoirs is caused to be cleaner than it would otherwise have been, and although nothing has been done at present, the appellants could at any moment go in and have these grips cleaned out, and undoubtedly if the grips became choked, and did not send the water down freely, they would go in and clean them out. The fact that they have not done it in the particular rateable year is not, in my opinion, enough to afford a conclusive test that in that particular year they have had no beneficial use of the gathering ground. In my opinion the facts which are stated in the special case, including that of the warning off of people by the agency of the

(1) [1895] A. C. 117.
(2) [1907] 1 K. B. 192.
(3) [1909] 1 K. B. 78.
(4) (1901) 85 L. T. 45.

gamekeeper or the representatives of the sporting tenant, taken together shew that in this case the appellants have a beneficial use of the gathering ground, which is entirely inconsistent with any one else being the occupier. If they had let the ground and put it into the occupation of other persons, who would be rateable, a different question might arise. In my judgment this land was in the rateable occupation of the appellants, and the view taken by the Court of quarter sessions with regard to that matter was not correct. For the reasons I have stated I hold that the corporation were in rateable occupation of the said land.

On behalf of the appellants it was said that the result might be that they might be rated twice over; that in the parish where the reservoirs are their value has been enhanced because they collect the water which comes from a very considerable area. That possibly may be so, but it is no uncommon incident. The subject has often been considered. The existence of a burthen from the rateability of an indirectly productive hereditament is a common feature of these complicated cases. I do not want to multiply instances, because there is one so well known that it is sufficient to state it. I refer to stations separately assessed in railway rating. It is common, where stations are separately assessed in other parishes, that in rating a portion of the whole earning undertaking a deduction for the stations separately assessed has to be made. So in the present case, if in future the waterworks (the really productive part) in some parish where they are directly productive are rated, a proper deduction will have to be allowed in respect of the sum which has to be paid for the indirectly productive parts in other parishes, which are not in the parish which is the subject of rating. It does not follow that if the appellants are held to be rateable in respect of the gathering ground they must be rated twice over, or doubly rated. I therefore come to the conclusion that the first question must be answered by saying the appellants, the Liverpool Corporation, were in rateable occupation of the moorland as well as the plantations and nurseries.

With regard to the plantations and nurseries the question

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

Lor Alverstone C.J.

arises as to whether or not they ought to be assessed under s. 4 of the Rating Act, 1874, which relates to the rateable value of land used for a plantation. As I understand that question it is whether they are to be rated as plantations and nurseries, or whether they ought to be rated at an enhanced value because there is the water running through them. On behalf of the respondents *Talargoch Mining Co.* v. *St. Asaph Union* (1) was cited in support of the view that they should be rated at the enhanced amount. My answer is that they ought to be rated as the Court of quarter sessions decided, namely, at 2*s.* and 15*s.* per acre, but the question cannot be quite satisfactorily answered without expressing one's reasons. If the whole ground were treated and rated as a whole—as a gathering ground of 1165 acres—then of course the basis of rating would be what would fairly be paid for it as a gathering ground, and, therefore, if it is in future treated as a whole, it may be that what I have said with regard to the rating of the plantations and nurseries may require some reconsideration on a future occasion. But for the purpose of this case I am assuming that the appellants have been separately rated as occupiers of the woodlands and nurseries. If rated as occupiers of the woodlands and nurseries it seems to me that that particular occupation ought not to be treated as enhanced by the fact that the pipes or grips run through conveying the water. In my opinion, if the rating authority elects, quite properly, to divide the gathering ground into two hereditaments, it cannot be said that qua woodlands, or qua nursery grounds, the value of the occupation can be considered to be enhanced because physically they are included in the gathering ground. That question will only arise if the rating authority purports or thinks it right at any time to deal with the whole as a gathering ground. It seems to me that, the rating authority having elected to rate the plantations and nurseries separately, the question whether or not the woodlands and nurseries are to be rated on any other basis because they happen to be below the level and next in position to the gathering ground does not affect the question of what should be the rateable value as nursery gardens or as plantations.

(1) L. R. 3 Q. B. 478.

With regard to question 3 it seems to me that the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for plantations and nurseries. In dealing with the rating of plantations and nurseries what they are worth as plantations and nurseries has to be considered, and for that purpose any high or low price paid with some different object has no relation to the value of the nurseries and plantations. I think, therefore, the second and third questions should be answered in favour of the appellants, and the first in favour of the respondents.

HAMILTON J. I am of the same opinion. The first question, whether the appellants were or were not in rateable occupation of the part of the gathering ground referred to, is essentially a question of fact. The passage which has been relied on in the judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers* (1)—acquiesced in, both as regards the result and the reasoning upon which it was based, by all the other members of the House by whom the appeal was heard—is one which, if it is part of the reasoning upon which the decision was grounded, binds us, and if it were not, would still be a declaration of the principles of law applicable to rating from which, speaking for myself, I should with difficulty be constrained to differ. The fact that the appellants are owners in fee simple in possession of the part of the gathering ground in question is prima facie evidence of occupation, but is rebuttable, first and most directly by proof that some one else is in occupation, but also—as it appears to me, from the way in which the proposition is laid down in the authorities—by the nature of the case. It is to be observed that in *Winstanley* v. *North Manchester Overseers* (1), *Rex* v. *London Corporation* (2), and *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.* (3) there was no question of a derelict tenement. They were all cases in which use was in fact being made of the premises, and I do not read the passage in the judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers* (1) as disputing that there may be cases

(1) [1910] A. C. 7. (2) 4 T. R. 21.
(3) [1895] A. C. 117.

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

Hamilton J.

where bare ownership without any user of the property involves no rateability, even although there may be no evidence that any one else is in occupation. The case of *Crowther Smith* v. *New Forest Union* (1), which was not cited before the House of Lords in *Winstanley's Case* (2), is authority for that, and does not appear to be touched by the proposition laid down in *Winstanley's Case*. (2) The judgment of Lord Herschell L.C. in *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.* (3), quoted in the *Winstanley Case* (2), says that if it could be shewn that the drainage company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement; that, being owners, they would prima facie be the occupiers, and that they would be so regarded unless the occupation were shewn to be in some one else. That passage relates to a tunnel in use, and leaves open the question whether or not proof of ownership and of nothing else might not in some cases—say of a derelict tenement—be consistent with there being no occupation in fact. The suggestion that this passage goes further, which is supported by reference to the *St. Luke's Hospital Case* (4) and *Reg.* v. *St. Pancras Assessment Committee* (5), cannot, I think, be sustained. In the *St. Luke's Hospital Case* (4) the judgment commences by saying that "Cases of this kind depend upon the particular nature of the respective hospitals; each stands upon its own distinctive circumstances. Therefore no general consequences will arise from the determination of this particular case." It then proceeds to deal with the contention that the proprietor of lands cannot discharge his property from its legal duty by his own private voluntary act, and the answer is that it does not hold true in fact, instancing as an illustration that an owner of a house may pull it down and convert it into a toft, and thereby affect the value at which it can be rated at his own will and pleasure. Lord Mansfield says that the owner of lands may, if he pleases, suffer them to lie barren and unoccupied, and he then passes on to the question of tithes, in a passage which

(1) (1890) Ryde, Rat. App. 311.
(2) [1910] A. C. 7.
(3) [1895] A. C. 117.
(4) 2 Burr. 1053.
(5) 2 Q. B. D. 581.

does not conflict with the proposition that even in the case of barren and unoccupied land ownership may be prima facie evidence of occupation. Nor does the judgment of Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (1) conflict with the proposition in *Winstanley's Case* (2), as I understand it, for he says that legal possession does not of itself constitute an occupation, instancing the case of the vacant house, and he does not say anything to conflict with the view that ownership is in most cases prima facie and useful evidence of occupation, failing proof that some other person is in occupation. Here not only is there prima facie evidence of occupation in the fact that the appellants are owners of the fee simple in possession, and an absence of any rebutting evidence that any one else is in possession, but any doubt that might remain seems amply covered by the conditions under which the ownership was acquired and the objects for which it is held by the appellants. This is not a case where the legal estate is vested in a person for no specific purpose whatever, as where a bare trustee has the estate outstanding in him although the beneficial owner may get it in at any time, or where an heir-at-law has property vested in him without knowing the fact and the property remains derelict for some time before the heir-at-law is discovered. Here ownership was acquired and is held by the appellants for a specific purpose, and that specific purpose carries and is intended to carry with it—to use an uncontroversial term—control, and the whole object with which the land was acquired was the retention of control and the exercise of it in case of need. It is upon that point that the answer to the first question principally turns. The land having been acquired by a large although, no doubt, a very wise expenditure of money, the appellants (the new owners) proceeded to exercise upon the land very considerable physical acts of occupation. They demolished certain farmhouses and buildings, they planted portions of the land, and took steps in relation to the whole with a view to extinguishing outstanding rights of pasture and turbary. All this was done not only in order that they might turn off the land every inhabitant and every person entitled to enter upon

(1) 2 Q. B. D. 581. (2) [1910] A. C. 7.

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

Hamilton J.

it, but in order that they might as far as possible diminish the inducement to enter upon the land by making it to a large extent uninhabitable. The land referred to in question 1 appears to have been fenced in a ring fence when acquired by the appellants. That fence has been maintained, and it appears quite clear from the statement of the policy pursued with regard to the land that the maintenance of the fences—just as the exclusion of trespassers—is part of the continuing purpose and policy with which the land is held. We cannot assume that the mere awe arising from the fact that the legal title is vested in the Corporation of Liverpool is enough to deter wanderers from venturing into this wilderness. There is involved in the findings in the special case the fact that it is the present intention and the right and policy of the appellants to exercise any other form of control that may be convenient and necessary in future in order to secure this result. If trespassers make their appearance to any serious extent they will be not only warned off, as they are at present, by the gamekeeper of the lessee with the authority of the appellants, but will also be prevented from coming on the land and be physically excluded in case of need and punished by law if proof can be obtained. Nothing has been brought to our notice, either existing in the circumstances or arising out of the legal rights of the appellants, which in any way restricts their further use of the land in any direction which is consistent with the general policy with which it was obtained.

The extract from one of the reports relating to the general policy with regard to the gathering ground shews that their intention was to combine the prevention of pollution of the stream and reservoir with any subsidiary beneficial use of the area that might be open to them. Apparently sheep farming either has not been resorted to, or if considered has been at present rejected. The sporting rights in the land are let to a sporting tenant. Portions of the land have been utilized for forestry. Other portions have been planted in order to improve the sporting amenities. From the covenants which the lessee of the sporting rights has entered into it is clear that, whatever may be presently done, the hold which the appellants are maintaining on the land, of which they are legally in possession,

includes in its objects and contemplation entrance upon the land for various purposes, ancillary to gathering of water, but also included among those limited uses which will most advantageously, in the words of their report, prevent the pollution of the stream and reservoir. If this had been in fact a derelict wilderness it is possible that that circumstance in itself might constitute some rebuttal of prima facie evidence created by the fact of ownership. But although it is preserved more or less in a state of nature, the land is anything but derelict and is in fact being used, in pursuance of a highly intelligent policy, in a manner which has involved and still involves continuous control by the appellants over the land and which is deliberately inconsistent with the transfer of occupation to any other person. I therefore think that the answer to the first question put to us is that the appellants were in rateable occupation of the land therein referred to.

As to the plantations and nurseries, their rateable occupation is not in dispute. The questions are as to the amount at which they ought to be assessed, and as to the admissibility of evidence of the purchase price paid for the gathering ground as evidence of the rateable value of the land used for the plantations and nurseries. I think it is sufficient to say that the answer to questions 2 and 3 respectively is that the plantations and nurseries should be assessed as the sessions decided, and that the price paid for the gathering ground is not admissible as evidence of the rateable value of the land used for plantations and nurseries. It is unnecessary to say anything with regard to the evidence that might be admissible upon the assessment of the gathering ground as such, or upon any question which might arise in that event as to the relation of the cost of obtaining and keeping up the gathering ground to the amount at which it should be assessed. No question arises in the present case as to the true method of assessing the reservoirs and water undertaking. The plantations and the nurseries, having become plantations and nurseries and having for that reason been taken out of the gathering ground and made a separate subject of rating, must be rated as plantations and as nurseries, and the fact that they were bought at a high price—

1911

LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS.

albeit in connection with a water undertaking—does not enhance their value as plantations and nurseries. Accordingly upon those two questions the decision must be in favour of the appellants in the Court below.

AVORY J. I agree that the answer to the first question should be that the appellants were in rateable occupation of the land therein referred to. It appears to me that they were reserving and using this land for the purpose of supplying their reservoirs and thence their waterworks with pure and unpolluted water. That is the use which they were making of it. I think the passage which the Lord Chief Justice has read from the judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers* (1) governs this case. I wish also to say that I concur in the reservation which the Lord Chief Justice has made with regard to the proposition of law laid down in that case; in other words, I think that the whole of the passage on pages 14 and 15 of the report of *Winstanley* v. *North Manchester Overseers* (1) in the *Law Reports* must be read as one, and in that sense only I agree that it governs this case.

The question whether an owner in possession—no one else being in occupation—therefore becomes an occupier may be a purely academic question. For the present purpose the question is whether the appellants are in beneficial occupation so as to make them rateable, and it is in that sense that I think the passage from the judgment in *Winstanley's Case* (1) governs this case, because, for the reason I have given, I cannot doubt that the appellants are in beneficial occupation of this land. On their behalf it was contended that they are not in occupation because, it was said, the whole object of their possession of the land is to keep it unoccupied. That is a subtlety which affords one a certain amount of mental enjoyment, but I do not think it is sound in its application to this case. I think the true position of things is that the appellants are in possession of this land for the sole purpose of preventing it being occupied by any one else, not for the purpose of keeping it totally unoccupied. If this were a huge lake instead of an area of land upon which the water falls, and

(1) [1910] A. C. 7.

the appellants had purchased the lake, I apprehend that it could not be doubted that they would be rateable as the occupiers of land covered with water; and it seems to me to make no difference that they occupy land upon which water falls, and which they use for the purpose of a gathering ground.

In *Talargoch Mining Co.* v. *St. Asaph Union* (1) it was expressly held that the owners of the mine were rateable for the watercourse, including that part of the watercourse which was open—not artificially constructed in any way, but a natural and open watercourse—and it was held that they were rateable for that portion of the watercourse as occupiers of land covered by water, and in my judgment there is no distinction between that case and the present one.

I also agree that the answer to question No. 2 is that, if the appellants are rateable as occupiers of plantations and nurseries, the basis upon which they have been rated is right; and that on the same assumption the answer to question No. 3 is that, if they are rated as occupiers of plantations and nurseries, the price paid for the gathering ground is no evidence of the rateable value of those plantations and nurseries. I only wish to add—because I do not doubt that this question of whether the price paid is admissible in evidence will come up for consideration on some future occasion—that, even though it may be that the price paid cannot be excluded as being legally inadmissible, I see no reason whatever to doubt that the question is not what the appellants have paid or might be willing to pay, but what they might reasonably be expected to pay. The fact that in circumstances of compulsion they paid a certain price is no evidence of reasonable value to them.

Judgment of Court of quarter sessions varied.

Solicitors for appellants: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

Solicitors for respondents: *Crowders, Vizard, Oldham & Co., for Stanton & Sons, Chorley.*

(1) L. R. 3 Q. B. 478.

J. E. A.

1911
Feb. 8.

DEDDINGTON STEAMSHIP COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Marketable Security — Debentures purporting to create Charge on Ships—Previous Mortgage of Ships to Trustees for Debenture-holders—Deed of Covenants with Trustees for Payment of Sums secured by Debentures—Liability of Debentures to Stamp Duty—Instrument for Disposition of Interest or Property in Ship—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *First Schedule*, "*Marketable Security*," "*General Exemptions from all Stamp Duties*," *clause* 2.

A company incorporated under the Companies Acts, 1862 to 1888, issued a debenture for 1000*l.* and interest thereon, which was a marketable security within the meaning of the First Schedule to the Stamp Act, 1891. The debenture was one of a series issued by the company for securing an aggregate amount not exceeding 20,000*l.* It contained a covenant by the company with the registered holder for the time being to pay the 1000*l.* and interest. Then followed words whereby the company purported to charge with the payment of the 1000*l.* and interest three steamships, and a proviso entitling the company to the use and employment of the steamships in the usual course of their business until default were made in payment of the principal money or interest secured by the debenture, whereupon the debenture was to be immediately enforceable, with a limitation that the liberty to use and employ the steamships was not to be held to authorize the creation of any mortgage or charge of or upon the steamships or any part or share thereof having priority over the charge purported to be created by the debenture. The debenture also contained a declaration that it was subject to and with the benefit of the conditions indorsed thereon. Those conditions provided, inter alia, that the series of debentures so issued should rank pari passu, without any preference or priority of one debenture over another, as a first charge on the steamships; that warrants for the payment of interest should be sent by post to the registered holders of the debentures; and that a register of debentures for the entry of transfers on the register free from equities should be kept. By the conditions it was also declared that "the holders for the time being of this debenture and the other debentures of this issue (in addition to the charge hereby respectively created) shall be entitled pari passu to the benefit of a deed of covenants, dated December 22, 1909, ... and three several mortgages of even date therewith." The three mortgages of December 22, 1909, were respectively mortgages of the three steamships and were in the form contained in Part I. of the First Schedule to the Merchant Shipping Act, 1894, and the deed of covenants of even date recited these mortgages (which were granted by the company to certain trustees for the debenture-holders) and contained covenants by the company with those trustees with regard to the payment of the principal money and interest intended to be secured by the debentures, and other covenants and provisions for

the maintenance of the security and for its realization in case of default:—

Held, that the debenture did not create any charge beyond that which was already in existence under the mortgages and deed of covenants; that if it transferred any interest it did so only contingently, in an event which had not happened, and not as its substantial object; that it was therefore not an instrument for the disposition of an interest in a ship within the meaning of clause 2 of the "General Exemptions from all Stamp Duties" contained in the First Schedule to the Stamp Act, 1891; and that consequently it was liable to stamp duty under the head "Marketable Security," clause 1, contained in the First Schedule to the Act.

CASE stated by Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

An instrument duly executed was presented on behalf of the appellants, the Deddington Steamship Company, Limited, to the respondents, the Commissioners of Inland Revenue, under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument was a marketable security, and was in the following terms:—

"No. of Bond 1. £1000 : 0*s.* : 0*d.*

"The Deddington Steamship Company, Limited.

(Incorporated under the Companies Acts, 1862 to 1888.)

"Issue of debentures not exceeding in amount 20,000*l.*, pari passu, as a charge on the steamships *Arlington*, *Clinton*, and *Buxton*.

"The Deddington Steamship Company, Limited, will on the first day of January, 1915, or on such earlier day as the principal moneys hereby secured shall become payable, pay to Mrs. Gertrude Mary Bailey, of 'Stelvio,' Newport, Monmouth, or other the registered holder for the time being hereof, at the registered office of the company, the sum of 1000*l.*, and the said company will in the meantime pay to such registered holder interest on the said sum of 1000*l.* at the rate of five pounds per centum per annum, such interest to be paid by equal half-yearly payments on the first day of January and the first day of July, in every year, until the said debenture shall be paid. The first of such half-yearly payments to be made on the first day of July next.

"And the company do hereby charge with the payment of

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

the said sum of 1000*l.* and interest the steamships *Arlington*, *Clinton*, and *Buxton* respectively, of the port of Hull, and to the benefit of the charge hereby made and the mortgages on such vessels given to the trustees for debenture-holders, this and other debentures of this series are entitled pari passu. Provided always that the company shall be at liberty, from time to time and at all times during the continuance of this debenture, to use and employ all or any of the said steamships in the usual course of their business until default in payment of the principal money hereby secured, or the payment of some interest thereon, or some part of such principal money or interest, for the period of one calendar month after such principal money and interest respectively shall become due, according to the tenor hereof, or until an order of some Court of competent jurisdiction shall be made or a special or extraordinary resolution of the company be duly passed for the winding up of the company, or if a distress or execution be levied or sued out, upon or against any of the said steamships, or if a breach be committed of any covenant contained in a deed of covenants, dated the twenty-second day of December, 1909, and made between the company of the one part and George Jones and Thomas Bailey, trustees for the debenture-holders, of the other part. From and after such default or the making of such order or the passing of any such resolution of the company, as above mentioned, whichever shall first happen, the liberty and authority of the company hereinbefore given shall forthwith cease and determine, and the charge by this debenture created shall and may be immediately enforceable. Nothing hereinbefore contained shall be held to authorize the creation of any mortgage or charge of or upon the said steamships, or any part or share thereof, having priority over the said charge. And it is hereby declared that this debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed part of it.

"Given under the common seal of the company this 31st day of December, 1909.

"Sealed with common seal of the company and signed by the manager of the company in the presence of } L.S.

"The conditions within referred to:

"1. This debenture is one of a series of debentures to be issued by the company for securing an aggregate amount not exceeding 20,000*l.*, consisting of debentures, each for 100*l.* or some multiple thereof, with interest thereon at the rate of 5*l.* per cent. per annum. The debentures so issued shall rank pari passu without any preference or priority over one another as a first charge upon the said steamships charged therewith.

"2. Warrants for the half-yearly payments of interest on this debenture shall be sent by post to the registered holder thereof on the days on which such payments respectively shall become due, and as from the day fixed for the redemption of this debenture it shall cease to carry interest, provided the principal sum secured by the debenture and all interest accrued thereon up to the day fixed for redemption are paid to the holder on demand or at any time after the day fixed for the redemption thereof, but if not so paid the debenture shall continue to carry interest until payment. And if by arrangement between the holder and the company the principal sum secured by this debenture shall not be paid on the said first day of January, 1915, this debenture shall carry interest at the rate aforesaid until repayment of the principal, and in case of such an arrangement being made the holder shall not require payment nor shall the company make payment of the principal until three months' notice in writing, to expire on one of the said half-yearly days, shall have been given to the other of the intention to require or make such payment.

"3. A register of debentures will be kept by the company, wherein shall be entered the names and addresses and descriptions of the holders for the time being of the said debentures and the distinctive numbers of the debentures belonging to each such holder. Every registered holder of a debenture may transfer the same by an instrument in writing, but the transferor shall be deemed to remain the holder of such debenture until the name of the transferee is entered on the register in respect thereof. Every instrument of transfer must be left at the registered office of the company with a transfer fee of 2*s.* 6*d.*, and the name of the transferee shall thereupon be entered in the

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

register as the holder of the debenture transferred. No notice of any trust, express, implied, or constructive, shall be recognized by the company, or be entered on the register in respect of any debenture. The executors or administrators of any deceased registered holder shall be the only persons recognized by the company as having any title to such debenture. The register shall be open at all reasonable times for inspection by any registered holder of debentures.

"4. The registered holder for the time being of this debenture will be entitled to the principal moneys and interest hereby secured free from any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for the time being of this debenture for the principal money and interest intended to be hereby secured shall be a good discharge to the company, which shall not be bound to inquire into the title of the registered holder, or to take notice of any trust affecting such moneys, or be affected by express notice of the right, title, or claim of any other person to such moneys or interest.

"5. The holders for the time being of this debenture and the other debentures of this issue (in addition to the charge hereby respectively created) shall be entitled pari passu to the benefit of a deed of covenants, dated the twenty-second day of December, 1909, and made between the company of the one part and George Jones and Thomas Bailey (trustees for debenture-holders) of the other part, and referred to in the foregoing debenture, and three several mortgages of even date therewith, given by the company to the said trustees, whereby the steamships *Arlington*, *Clinton*, and *Buxton*, of the port of Hull, have been vested in the said trustees for securing the payment of the principal moneys and interest payable by virtue of such debentures, and the performance of the stipulations herein contained.

"6. The principal moneys hereby secured shall immediately become payable if there be a breach by the company of the deed of covenants mentioned in the last preceding clause."

Condition 7 enabled the company at any time after January 1, 1913, to repay to the registered holder of the debentures the principal sum of any debenture with the interest owing thereon.

Condition 8 provided that the particular debentures to be paid off were to be determined by drawings after giving ten days' previous written notice of the drawings to each of the trustees.

"9. Forthwith after such drawings notice will be given by post to the registered holder of each debenture to be paid off, addressed in accordance with his address in the company's debenture register, and the moneys shall be paid three months after the posting of the notice, with interest to that date."

The deed of covenants referred to therein was dated December 22, 1909, and made between the appellants of the one part and George Jones and Thomas Bailey, the trustees for the debenture-holders, of the other part, and, after reciting, among other things, that mortgages of the steamships *Arlington*, *Clinton*, and *Buxton* had been granted to the said trustees, contained covenants with the trustees that the company would pay the principal money and interest secured by the debenture bonds, that the principal moneys and interest secured by the debentures and by the trust deed should be a charge on the said steamships, that the company would keep the steamships in repair and fully insured and would produce policies of insurance on demand by the trustees and pay the premiums thereon, and that if default should be made in keeping the steamships in a good state of repair the trustees might repair the same at the expense of the company. It also contained a power to the trustees in certain events to take possession of the said steamships and sell the same, and other provisions for the maintenance of the security.

The mortgages of the steamships referred to in the trust deed were respectively in the statutory form prescribed by the Merchant Shipping Act, 1894. The debenture in question formed one of the series mentioned in the trust deed.

The appellants contended that the instrument was exempt from duty under clause 2 of the General Exemptions from all stamp duties contained in the First Schedule to the Stamp Act, 1891. (1)

(1) Stamp Act, 1891, First Schedule, "General Exemptions from all Stamp Duties":

"(1.) Transfers of shares in the Government or parliamentary stocks or funds.

"(2.) Instruments for the sale, transfer, or other disposition either

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

The Commissioners, being of opinion that the instrument was not so exempt, held that it was liable to duty under the head "Marketable Security" in the First Schedule to the Act of 1891, and assessed the duty accordingly at 1*l.* 5*s.*, being 2*s.* 6*d.* per cent. on the amount thereof.

The question for the opinion of the Court was whether the instrument was correctly assessed, and, if not, with what duty (if any) it was chargeable.

A. Adair Roche and *T. Cuthbertson*, for the appellants. The debenture is an instrument for the disposition of an interest in ships and is therefore exempt from stamp duty under clause 2 of the General Exemptions from stamp duty contained in the First Schedule to the Stamp Act, 1891. It contains a charge upon the steamships only and not upon any other property. The charge transfers or disposes of an equitable interest in the ships, namely, the right on the happening of certain events to have the ships sold for the benefit of the debenture-holders. In giving judgment in *Duke of Northumberland* v. *Attorney-General* (1) Lord Macnaghten said that "it is clear that the terms 'disposition' and 'devolution' must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law." A "disposition" may not amount to a transfer; a declaration of trust is sufficient to constitute a "disposition." The decision in *Driver* v. *Broad* (2) shews that these debentures create an interest in the ships in favour of the debenture-holders. The debentures confer upon the debenture-holders the right to bring an action to enforce the charge by sale of the ships if the trustees of the trust deed did not act. The effect of the General

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absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel.

"(3.) Instruments of apprenticeship . . . . entered into in the United Kingdom for or relating to the service in any of Her Majesty's colonies or possessions abroad of any person as an artificer," &c.

. . . .

"(6.) Instruments made by, to, or with the Commissioners of Works for any of the purposes of the Act 15 & 16 Vict. c. 28."

(1) [1905] A. C. 406.

(2) [1893] 1 Q. B. 744.

Exemptions in the First Schedule to the Stamp Act, 1891, is to make instruments, which might be otherwise chargeable, exempt if they are within the exemptions: *Warrington* v. *Furbor*. (1) The policy of the Legislature is to make the transfer of ships as easy as possible, and at the present time the usual practice is to borrow money by means of mortgage debentures with coupons for interest attached. The essence of the transaction is that it is a borrowing upon the security of the ships. The debenture contains a covenant to pay and a charge. The fact that the debenture is a marketable security is quite immaterial if it is within the exemptions. The debenture contains only those provisions which are proper to a mortgage, including the covenant to pay. That covenant is contained in every mortgage. The debentures, the trust deed, and the deed of covenants were all given with the object of securing repayment to the debenture-holders, and to impose stamp duty upon this debenture would defeat the object of clause 2 of the General Exemptions in the First Schedule to the Stamp Act, 1891. If the debenture had created a charge upon something in addition to the ships, e.g., upon the office furniture of the appellants, it would no doubt have been liable to duty in accordance with the principle which appears in s. 4 of the Act of 1891, but it is nothing more than an instrument disposing of an interest in ships and is therefore within clause 2 of the General Exemptions. [The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93, and Maxwell on the Interpretation of Statutes, 4th ed., p. 429, were also referred to.]

Sir Rufus Isaacs, *A.-G.*, and *Finlay*, for the respondents. Whether or not the debenture is liable to stamp duty depends upon its primary object. The primary object is not to create a security, but to give a covenant to pay by the company. The debenture gives nothing by way of security; for the trust deed had already transferred the interest in the ships by way of mortgage. The debenture is in substance a covenant to pay. It is a marketable security and a debenture, and is not within the General Exemptions in the First Schedule to the Stamp Act, 1891. It is not intended to be a mortgage. *Driver* v. *Broad* (2) is

(1) (1807) 8 East, 242. (2) [1893] 1 Q. B. 744.

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

distinguishable. In that case the debenture created the mortgage; there was no trust deed. In the present case the debenture does nothing more than recite the security which was created by the trust deed. That is done in order that this marketable security may have upon its face a statement of what the security is to the holder of the debenture. Until the debenture was given there was no promise to pay 1000*l.* to a particular debenture-holder, but only a promise to pay 20,000*l.* to the trustees of the trust deed. The debenture is the machinery by which the mortgage given by the trust deed is divided into parts, and the real reason for its coming into existence is that the company may give the covenant to pay 1000*l.* and to shew that the 1000*l.* is included in the 20,000*l.* mentioned in the trust deed, and that the holder is entitled to the security created by the trust deed up to 1000*l.* pari passu. All the clauses in the General Exemptions in the First Schedule to the Stamp Act, 1891, have regard to the primary object of the instrument. For example, in order that a transfer may be within clause 1 of the General Exemptions its primary object must be the transfer of shares in Government or parliamentary stock. In the present case the instrument is a marketable security and the Crown has a right to charge it with duty under that description: *Speyer Brothers* v. *Inland Revenue Commissioners.* (1)

Cuthbertson in reply. It is clear from the words "the company do hereby charge" and "to the benefit of the charge hereby made" contained in the debenture that it was the intention to give the debenture-holder a further security than that which he already had. If the mortgages to the trustees were for some reason held to be bad, the holders of these debentures would still have a security under the debentures. The debentures do therefore dispose of an additional interest in the ships. In substance they are not a covenant to pay, but a security for a loan.

HAMILTON J. The question is whether this instrument is or is not chargeable with stamp duty. The appellants, who issued it, concede that it is a debenture and that it is a marketable

(1) [1908] A. C. 92.

security, but they contend—and in order to succeed they must establish this contention—that it is within clause 2 of the General Exemptions from all stamp duties contained in the First Schedule of the Stamp Act, 1891, which exempts "Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel."

Sect. 1 of the Stamp Act, 1891, while charging the instruments set out in the First Schedule, of which marketable securities, debentures, mortgages, or covenants for the repayment of money are items, makes those charges subject to the exemptions contained in the Act; and s. 4 provides that "Except where express provision to the contrary is made"—which is not the case here—"an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters." It is not contested by the Crown that the circumstance that this instrument is a marketable security or other instrument named in the First Schedule to the Act of 1891 is immaterial if it is within the terms of the General Exemptions, unless it can be treated as an instrument containing or relating to several distinct matters; so distinct that the portion coming within the exemption can be validly separated from the portion coming only within the enumerated instruments in the schedule which are subject to charge.

The whole question turns upon the instrument itself, and my decision will not necessarily apply except where instruments of substantially the same form are employed and are preceded by deeds of trust and mortgages also in substantially the same form as those in the present case. The debenture—it is convenient to call it a debenture—is given under the common seal of the company and is dated December 31, 1909. It had been preceded by mortgages of the steamships mentioned in it expressed in the statutory form contained in Part I. of the First Schedule to the Merchant Shipping Act, 1894, and dated December 22, 1909, and by an indenture or deed of covenants of even date reciting these mortgages, made between the company and certain trustees who were the mortgagees, and containing

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Hamilton J.

covenants by the company with those trustees for payment of the principal money and interest intended to be secured by these debenture bonds, and other covenants and provisions for the maintenance of the security and for its realization in case of default. The debenture itself is in general in a familiar form. It commences by a covenant by the company with the registered holder for the time being to pay the principal and interest of a portion of the loan secured by the debenture issue, each debenture being for the amount of 1000*l*. It then purports to charge with the payment of that principal and interest the steamships in question. Then follows a proviso entitling the company to the use and employment of the steamships in the usual course of their business until default is made, whereupon the debenture is to be immediately enforceable, with a limitation that the liberty to use and employ is not to be held to authorize the creation of any mortgage of or charge upon the steamships or any part or share thereof, having priority over the charge purporting to be created by this debenture. It then declares that the debenture is subject to and with the benefit of the conditions indorsed. Those conditions first of all provide for the issue of the debentures pari passu without any preference or priority of one over another as a first charge on the steamships. They then provide in ordinary terms for warrants for the payment of interest, for a register of debentures, for the entry of transfers on the register free from equities, and condition 5 declares that "the holders for the time being of this debenture and the other debentures of this issue (in addition to the charge hereby respectively created) shall be entitled pari passu to the benefit of a deed of covenants, dated December 22, 1909, and three several mortgages of even date therewith already mentioned."

The appellants contend that this instrument purports to create a charge upon the ships, and it is clear that the draftsman used language advisedly or not indicative of the creation of a present charge. It says in terms that the company charges; it in terms recites that the debenture-holders are entitled "to the benefit of the charge hereby made"; it further says that if default is made "the charge by this debenture created shall" be immediately

enforceable and the debentures so issued shall rank pari passu "as a first charge"; and, further, that "in addition to the charge hereby respectively created" the debenture-holders shall be entitled pari passu to the benefit of the deed of covenants of December 22, 1909, as though that were some different benefit or charge from the one "hereby created."

Notwithstanding that language I must look at the substantial effect of the debenture. Is it an instrument for the transfer, by way of mortgage or otherwise, of any interest or property in these ships? Accepting the view that the word "disposition" is quite general and comprehends every conceivable mode in which property or an interest in a chattel can pass by act of parties, I am unable to see that the debenture fairly comes within the description contained in clause 2 of the General Exemptions. It is noticeable that clauses 1 and 3 of the Exemptions speak of "transfer *of* shares" and "instruments *of* apprenticeship," and clause 6 speaks of instruments made by certain persons *for* any of the purposes of the Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28). I think the word "for" is advisedly used in clause 2 of the Exemptions in the expression "instruments for the . . . . disposition . . . . of any interest . . . . in any ship." It points to an intention to exempt instruments of which the substantial object is the transfer or other disposition of an interest or property in a ship. Even if the present debenture does transfer any interest, it does so only contingently, in an event which has not happened, and not as its substantial object. Such transfer is a comparatively small part of the object of the instrument, and is quite distinct from the provisions relating to the creation and management of a debenture issue properly so called.

The document is headed "Issue of debentures not exceeding in amount 20,000*l.* pari passu as a charge on the steamships *Arlington*, *Clinton*, and *Buxton*." The debentures themselves, in the event which has happened, are not necessarily a charge on the steamships at all. Provision had been made before this debenture issue was created of a valid and sufficient charge for the purpose of securing this subsequent issue of debentures. The first words of the debenture are words of promise. They

1911

DEDDINGTON STEAMSHIP COMPANY, LIMITED v. INLAND REVENUE COMMISSIONERS.

Hamilton J.

are a covenant to pay. The words which follow are, it is true, words of charge. The important part of the instrument is the provision of the usual machinery by which a security, which has already been created by the execution of the mortgages and the deed of covenants with the trustees, may be apportioned so that the benefit of the charge may be effectually distributed among the different holders of the debentures. It is machinery in favour of individuals, making it possible to deal with the aggregate loan of 20,000*l.* as a marketable security, distributed among different holders in convenient sums and made readily transferable without the transfer being affected by equities which would defeat its marketable character. On the appellants' behalf it was said that if the mortgage and deed of covenants of December 22, 1909, had for any reason been invalid, then this instrument would have been effectual to give to the debenture-holders that charge which those invalid instruments ought to and were intended to have secured to them. That may be, but I cannot treat this instrument as one for the disposition of an interest or property in a ship merely because in an event which has not happened it might have had an effect which it has not now. This is the most intelligible way in which it has been suggested to me that an interest in a ship is or could be disposed of by this instrument, because—probably from unfamiliarity with the procedure of the Chancery Division—I have not been able to appreciate what advantage this charge would give to the debenture-holders which they do not in substance already possess by reason of the previous mortgages and deed of covenants. If there be an advantage it appears to be one of procedure, and not an advantage which could be called an interest in the chattel itself. The words "the company do hereby charge" really dispose of nothing which is not disposed of already. All the other passages quoted are only references to those words of charge, and the words "the company do hereby charge with the payment of the said sum of 1000*l.* and interest the steamships *Arlington*, *Clinton*, and *Buxton* respectively" have no further operative effect. The company had already not only charged but conveyed the ships to trustees for the debenture-holders for the purpose of securing not merely the

payment of the 1000*l.*, but of the whole amount of the debenture issue. The company's right to the equity of redemption was itself subject to the benefit of the charge being adequately assured to the holders of the debentures, and therefore the company are not charging anything by this instrument which they retained and could further charge after they had executed the mortgages on the three ships.

The remaining words of the same sentence are only a recital of something already effectuated by the mortgages; they only have the effect of stating on the face of the debenture that there are mortgages vested in trustees and that the holders of the debentures are entitled to the benefit of those mortgages and to the execution of the trusts by the trustees in their favour. It is not, therefore, the case of an instrument which mortgages a ship and then contains, as ancillary thereto, the personal covenant to repay, which would fall within the exemption. It is the case of an instrument which does not really dispose of any interest in the ships at all, but covenants to pay money with a number of necessary and convenient provisions for the purpose of creating and moulding a marketable security.

It appears to me, therefore, that the opinion of the Commissioners was right, and that the instrument was correctly assessed when the Commissioners held it liable as a marketable security within the First Schedule to the Stamp Act, 1891.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. E. A.

1911
Feb. 8, 9.

ATTORNEY-GENERAL *v.* EXETER CORPORATION.

Revenue—Grant by Charter of Revenue Fine to Corporation—Repeal of Grant by Revenue Acts—Excise Management Act, 1827 (7 & 8 *Geo.* 4, c. 53), *s.* 103—*Inland Revenue Act*, 1868 (31 & 32 *Vict. c.* 124), *s.* 1—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *ss.* 11, 33.

The Crown is entitled under s. 33 of the Inland Revenue Regulation Act, 1890, to revenue fines, notwithstanding any grant of those fines previously made by charter to any corporation.

Writ of subpœna whereby the Attorney-General claimed from the defendants a sum of 10*l.* The parties concurred in stating the questions of law arising in the following case for the opinion of the Court:—

On January 16, 1907, one Greville Hems was charged by an information exhibited before justices of the city of Exeter with an offence against s. 11 of the Inland Revenue Regulation Act, 1890 (1), and was convicted and ordered to pay a fine of 10*l.*

The fine of 10*l.* was duly paid by Hems to the clerk to the justices and was by him paid over to the city treasurer of the defendants.

The Attorney-General claimed the payment to His Majesty of the fine of 10*l.* under the Inland Revenue Regulation Act, 1890, but the defendants refused to pay over the sum to the Crown, claiming that they were entitled to retain it. The defendants relied upon charters granted from time to time to the city of Exeter by Henry II. and subsequent Sovereigns, and in particular charters granted by Edward IV. in 1463 (2), Henry VIII.

(1) Inland Revenue Regulation Act, 1890, s. 11: "If any person by himself or by any person in his employ obstructs, molests, or hinders —(*a*) an officer or any person employed in relation to inland revenue in the execution of his duty, ... he shall for every such offence incur a fine of one hundred pounds."

(2) The following is a translation of an extract from the charter of Edward IV., dated July 1, 1463: "Edward by the grace of God King of England and France and Lord of Ireland To all to whom the present letters shall come greeting Know ye that we of our special grace of our mere motion and certain knowledge have granted and by these presents do grant to the Mayor Bailiffs and Commonalty of our City of Exeter and their successors that . . . . the aforesaid Mayor Bailiffs Commonalty and their successors shall have for ever all and all manner of fines and amercements

in 1537, Queen Elizabeth in 1560 (this charter was confirmed by an Act of Parliament made in the year 5 Elizabeth and entitled "An Act for the confirmacon of certayn lyberties granted to the city of Exetour"), and by Charles I. in 1627. The annual sums of money accustomed to be paid by the city of Exeter to the King and his heirs and successors by way of fee farm rent expressed to be reserved by the charters of Henry VIII. and Charles I., in consideration of the privileges thereby granted, were still paid by the defendants. The defendants further relied upon letters patent of June 27, 1610, and upon an order of the Court of Exchequer of November 28, 1789.

The Attorney-General contended (inter alia) that the Crown was entitled to the sum of 10*l.* by virtue of s. 33 of the Inland Revenue Regulation Act, 1890 (1), and that legislation subsequent to the grant (if any) of such fines as were in question had revoked the grant.

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to be assessed and made and adjudged issues forfeited of all the residents and inhabitants aforesaid as well before us and our heirs and before the Treasurer and Barons of us and our heirs of the Exchequer and also before the Justices of us and our heirs of the Bench and before the Steward and Marshal and the Clerk of the Market of the Household of us and our heirs as before the Justices in Eyre for pleas of the Crown Common Pleas and Pleas of the Forest and whatsoever other Justices and Ministers of us and our heirs as well in the presence of us and our heirs as in the absence of us and our heirs And that the same Mayor Bailiffs and Commonalty and their successors by themselves or by their Bailiffs and Ministers shall be able to levy receive and have such fines amercements and issues without trouble or impediment of us or our heirs the Justices Escheators Sheriffs Coroners or other Bailiffs or Ministers of us or our heirs whomsoever."

The charter of Henry VIII., dated August 23, 1537, after a more extended grant to the city of Exeter than that contained in the charter of Edward IV., contained the following reservation: "Saving always and reserving to us our heirs and successors the same annual fee farm which the said Mayor Bailiffs and Commonalty of the city aforesaid are liable to pay annually to us."

(1) Inland Revenue Regulation Act, 1890, s. 33: "(1.) All fines, penalties, and forfeitures incurred under any Act relating to inland revenue which are not otherwise legally appropriated, shall be applied to the use of Her Majesty. (2.) All fines and penalties and the proceeds of all forfeitures incurred under any such Act, and all costs, charges, and expenses payable in respect thereof or in relation thereto respectively, shall be accounted for and paid to the Commissioners or as they direct."

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

The defendants contended (inter alia) that the Crown was not entitled to the sum of 10*l.* by virtue of s. 33 of the Inland Revenue Regulation Act, 1890, or otherwise, and that the grant to the defendants of the fine had not been revoked by subsequent legislation or likewise.

The question for the opinion of the Court was whether the Crown was or the defendants were entitled to the 10*l.*

Sir Rufus D. Isaacs, *A.-G.*, and *W. Finlay*, for the Crown. For the purposes of the present argument, it is not desired to contend that the charters relied on by the defendants did not originally pass such a fine as that now in question to them nor that the grant was invalid, although it is desired to keep those points open for argument in the Court of Appeal if necessary. For the purposes of the present argument it is assumed that the charters granted fines of this nature to the defendants and that the grant was valid. The contention now made on behalf of the Crown is that, while the charters still continue in force, the grant of fines or penalties so far as it relates to revenue fines or penalties has been revoked by s. 1 of the Inland Revenue Act, 1868 (1), which expressly provides that all fines incurred under any Act relating to the Inland Revenue shall go to the Crown, "anything in any Act to the contrary notwithstanding." When the Legislature intends to preserve rights of this nature they are mentioned in the statute which would otherwise revoke the grant. Sect. 1 of the Inland Revenue Act, 1868, was repealed by the Inland Revenue Regulation Act, 1890, and replaced by s. 33 of that Act. Therefore since 1868 all revenue fines have gone to the Crown.

J. Alderson Foote, *K.C.*, and *Stuart Moore*, for the defendants.

(1) Inland Revenue Act, 1868, s. 1: "All fines, penalties, and forfeitures incurred under any Act relating to the Inland Revenue, and recovered after the first day of October one thousand eight hundred and sixty-eight, shall go and be applied to the use of Her Majesty, her heirs or successors, anything in any Act to the contrary notwithstanding; and all such fines and penalties, and all such forfeitures or the proceeds thereof, and all costs, charges, and expenses payable in respect thereof or in relation thereto respectively, shall, without any deduction therefrom, be paid to the Commissioners of Inland Revenue, or to such officer or person as the said Commissioners shall appoint to receive the same."

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

The defendants' right to revenue fines has not been revoked. A previous charter, statute, or custom is not revoked by mere general words in a general Act: *Seward* v. "*Vera Cruz*" (1); *Thorpe* v. *Adams* (2); *Kutner* v. *Phillips* (3); *Fitzgerald* v. *Champneys* (4); *Barker* v. *Edger*. (5) The word "all" in s. 1 of the Inland Revenue Act, 1868, and s. 33 of the Inland Revenue Regulation Act, 1890, means all fines which have not been previously dealt with by charter, statute, or custom. At the time the Inland Revenue Act, 1868, was passed half of the fine went to the informer and half to the Crown, and the Act of 1868 was passed to take away the right of the informer. The half of the fine was given to the informer by the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 103. (6) Sects. 21, 23, 28, 29, 34, 35, and 37 of the Fines Act, 1833 (3 & 4 Will. 4, c. 99), are an illustration of the proposition that fines are considered as being paid to the Crown when they are paid to the Treasury, and that a grant to the King's use means to the use of the King and his grantees. Sect. 33 of the Inland Revenue Regulation Act, 1890, contemplates that the fines are to be paid to the Treasury, but are, in the hands of the Treasury, to be subject to the provisions of the Fines Act, 1833, i.e., are to be distributed to the persons entitled thereto. Further, the fines dealt with by the Act of 1890 are only those which had been divided between the Crown and the informer. It did not mean the fines which had been granted to a corporation. The words "anything in any Act to the contrary notwithstanding" in s. 1 of the Inland Revenue Act, 1868, mean notwithstanding the provision contained in the Excise Management Act, 1827, s. 27, which gives half of the fine to the informer. There are

(1) (1884) 10 App. Cas. 59.
(2) (1871) L. R. 6 C. P. 125.
(3) [1891] 2 Q. B. 267.
(4) (1861) 2 J. & H. 31.
(5) [1898] A. C. 748.
(6) Excise Management Act, 1827, s. 103, provides that "all penalties and forfeitures incurred and recovered under or by virtue of this Act or any other Act or Acts of Parliament relating to the revenue of excise (such cases only excepted for which other directions shall in any Act or Acts of Parliament relating to the revenue of excise be specially given) shall, after deduction therefrom of all costs and expenses relating thereto incurred, be distributed, one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety to the officer or officers of excise, or the person or persons who shall discover, inform, or sue for the same."

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

no words in the Inland Revenue Act, 1868, which shew that there was any intention on the part of the Legislature to deal with the charters. Municipal corporations were expressly dealt with by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). [Maxwell on Statutes, 4th ed. pp. 202, 268; *In re Smith's Estate* (1); *Gregory's Case* (2); *Attorney-General* v. *Horner* (3); and *Mayor of Leicester* v. *Burgess* (4) were also referred to.]

Sir Rufus D. Isaacs, A.-G., in reply. The words in s. 1 of the Inland Revenue Act, 1868, are "anything in any Act to the contrary notwithstanding," not "anything in any Act giving half the fine to the informant." The words are quite clear. It would be practically impossible to mention in detail every charter and private Act intended to be dealt with by the general Act. This fine was not in existence at the time the charters were granted. Excise legislation only commenced in the reign of Charles II., and in every case revenue fines have been appropriated to the Crown and the informer. Illustrations of this are 12 Car. 2, c. 23, s. 32, and 12 Car. 2, c. 24, s. 46. In those statutes there is no provision saving the rights of the corporation of Exeter or any other city to which charters had been given. There was no conflict with any other statute or charter, for a new penalty was being inflicted. In s. 17 of 7 & 8 Will. 3, c. 30, the first trace of the statutory offence of obstructing a person engaged in collecting revenue is to be found. Sects. 22 and 23 impose penalties for certain similar offences by brewers, distillers, &c., and s. 29 appropriates the penalty. Other enactments dealing with the same subject are 10 Geo. 1, c. 10, ss. 12 (where the words "let, obstruct or hinder" are used for the first time), 13, 40, and 41; the Sale of Spirits Act, 1750 (24 Geo. 2, c. 40), ss. 19, 29; and the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), ss. 24, 39, 103. The Inland Revenue Regulation Act, 1890, is consistent with the whole tenor of the earlier legislation. The only difference is that in the Act of 1890 there is a very definite enactment as to the destination of revenue fines and penalties. The rights of corporations are saved by appropriate words where that is intended.

(1) (1887) 35 Ch. D. 589.
(2) (1595) 6 Rep. 19b.
(3) (1884) 14 Q. B. D. 245.
(4) (1833) 5 B. & Ad. 246.

The whole course of legislation shews that down to 1868 revenue fines were appropriated part to the Crown and part to the informer and from 1868 to the Crown. [The Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23; the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 250; the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 125; and the Finance Act, 1907 (7 Edw. 7, c. 13), s. 23, were also referred to.]

HAMILTON J. This question relates to the right to fines imposed upon offenders within the limits of the city of Exeter for offences committed against the provisions of the Inland Revenue Regulation Act, 1890. The fine in this case was imposed under s. 11 of the Act for the offence of obstructing an Inland Revenue officer in the execution of his duty.

The claim of the Crown is based, as the legislation stands at present, upon the provisions of s. 33 of the Act of 1890. The claim of the Exeter Corporation rests upon a series of charters which in terms—particularly the charters of Edward IV., Henry VIII., and Charles I.—grant to the corporation of the city of Exeter fines and forfeitures arising within the city, with the right, not indeed to sue for, but to levy, receive, and have such fines and forfeitures. It is not on the present occasion contested that those charters were validly granted and, whatever their present effect may be, are in full force and effect, the Attorney-General reserving to himself the right to raise hereafter in the Court of Appeal any point, if necessary, that may be properly raised in that regard.

The whole question is one of construction, and it is important to remember, when considering authorities, that the object is to find out what the Legislature has enacted. The next thing to bear in mind is that the words of s. 33 of the Inland Revenue Regulation Act, 1890, are in themselves clear; it is not a section which in itself presents any ambiguities or obscurities of construction. It is said on the one hand that if these words, which are general, had not been intended to deal with fines inflicted in the city of Exeter as well as elsewhere, it would have been a simple and perhaps an obvious course to insert

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

Hamilton J.

a saving clause for the rights of existing corporations under still existing charters. That does not advance the matter much. If the words are clear, it is not to the point to say that they might have been clearer. One must remember that the form of statutes has become much more scientific as draftsmanship has developed, and that the necessity, or at any rate the wisdom, of using express saving clauses is probably more clearly appreciated when Parliament is dealing with some subject-matters than with others. If the words are apt and sufficient, the circumstance that there is no saving clause does not matter. The whole question is whether they are apt and sufficient to take away from the city of Exeter rights under the charters.

On the other hand the maxim "Generalia specialibus non derogant" has been relied upon, and many cases have been cited in which that maxim has been applied to various statutes in various subject-matters for the purpose of shewing that these words must be read as subject to an implied limitation which would leave unaffected the benefit of the Exeter charters. The subject-matter in this case is a revenue fine, one which is itself the creation of sovereign power and historically created by legislation. No question arises here as to whether the analogue of a revenue fine in the fifteenth or sixteenth century would have come within the words of this charter and have fallen to the city of Exeter, nor is it necessary to discuss whether, but for modern legislation, these revenue fines would have been fines within the meaning of the charters. It has not been contended that the mere circumstance that a particular fine—if it be a fine—is created at a date later than the date of the charters would prevent the charters from applying to it. The revenue fines in question are the creation of statute. They began with the year 1660, when by two statutes, 12 Car. 2, c. 23, and 12 Car. 2, c. 24, Parliament granted to His Majesty impositions on beer, ale, and other liquors for life and also abolished various tenures, settling upon His Majesty a revenue in lieu thereof. The Acts included, amongst other things, procedure before justices for the purpose of recovering fines, with power to the justices or commissioners of assize to mitigate such fines, and furthermore created various offences for

which fines should be levied. Further statutes enlarged this legislation, the statute 7 & 8 Will. 3, c. 30, passed in 1696, 10 Geo. 1, c. 10, passed in 1723, and 24 Geo. 2, c. 40, passed in 1751, followed by 7 & 8 Geo. 4, c. 53, passed in 1827. With that development began the creation of offences in connection with obstructing revenue officers who carry out the Acts. In 1696 it was made an offence for any person to refuse to allow a gauger or other officer to enter his premises for the purpose of the Excise; and this was still further developed in 1723, when it was enacted that any person who assaults, resists, opposes, molests, obstructs, or hinders any officer of the Customs or for the duties by that Act granted shall commit an offence—language which from that time onwards has been substantially in use down to the formula in the Inland Revenue Regulation Act, 1890, "obstructs, molests or hinders." The policy of the Legislature all through this period was to encourage common informers by giving them a share of the fine. A quarter was considered enough for a common informer in the seventeenth century; he rose to the receipt of one half in the eighteenth century, and it appears to be only in 1868 that his services could be so far dispensed with as to exclude him from a share in the fine altogether. The Excise Management Act, 1827, was a more extended enactment than the statutes which had preceded it. Sect. 103 enacts that "all penalties and forfeitures incurred and recovered under or by virtue of this Act or any other Act or Acts of Parliament relating to the revenue of excise (such cases only excepted for which other directions shall in any Act or Acts of Parliament relating to the revenue of excise be specially given) shall, after deduction therefrom of all costs and expenses relating thereto incurred, be distributed, one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety to the officer or officers of excise, or the person or persons who shall discover, inform, or sue for the same." When that section was superseded by the provisions contained in s. 1 of the Inland Revenue Act, 1868, a slightly more concise expression, which I think has the same effect, was used, namely, "All fines . . . . incurred under any Act relating to the Inland Revenue . . . . shall go and be applied to the

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

Hamilton J.

use of Her Majesty, her heirs or successors, anything in any Act to the contrary notwithstanding; and all such fines . . . . shall, without any deduction therefrom, be paid to the Commissioners of Inland Revenue . . . ." When the Inland Revenue Regulation Act, 1890, was passed, opportunity was taken to repeal in form s. 103 of the Excise Management Act, 1827, which had been virtually repealed already, and s. 1 of the Inland Revenue Act, 1868.

From the first creation of fines of this nature the Legislature has by one and the same enactment created the offence, imposed a fine, and appropriated the money to some specially stated purpose. In 1827 and again in 1868 it has added words of very precise limitation, "such cases only excepted for which other directions shall in any Act or Acts of Parliament relating to the revenue of excise be specially given," and "anything in any Act to the contrary notwithstanding." Can s. 33 of the Inland Revenue Regulation Act, 1890, in view of that history and subject-matter be read as still subject to an unexpressed exception in favour of the rights of the city of Exeter under its charters? The grounds upon which the Courts have construed general words in statutes so as not to interfere with prior special words or special Acts or prior rights publicly granted to bodies corporate or politic rest upon the theory, and (as I think) the fact, of the continuity and justice of English legislation. It is not to be supposed that the mind of the Legislature continuously deliberating and expressing itself in statutes will, after full special deliberation at one time, subsequently alter the result of that deliberation by mere general words not so expressed as to bring the special matter within their purview. It is not to be supposed that the mind of the Legislature so operating and expressing itself will take away the rights previously granted to subjects without compensation and without specific statements to that effect. This is the effect of the cases cited in argument though some possibly would not now be followed, as for example where an Act of Parliament was read as not interfering with a local custom.

In *Foster's Case* (1) it was laid down that "it must be known

(1) (1614) 11 Rep. 56b.

that forasmuch as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole realm for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act to be abrogated." No constrained construction appears to be necessary in the present case, and although the words of the Inland Revenue Regulation Act, 1890, are general, I fail to find them ambiguous. On the other hand, in *Attorney-General* v. *Horner* (1) Brett M.R. said, in giving judgment, "it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring any person's rights without compensation unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so." I do not see any reason in the present case for considering whether there is no other way of construing the words of the Inland Revenue Regulation Act, 1890. If the words of the Act are clear it is not the function of the Court to struggle to find some other way of construing them. The words of the Legislature are the text of the law and must be obeyed.

Turning to the provisions of the enactment, I think that the Legislature in 1827, and—if it were necessary to do so—again in 1868, by language so clear that I have neither the right nor the wish to get away from it, intimated, without naming any particular charters, cities, or corporations, that to the provisions then enacted all such private rights must bow, and by the words which I have already read in s. 103 of the Excise Management Act, 1827, and s. 1 of the Inland Revenue Act, 1868, prevented the possibility of its being successfully contended that revenue fines, at any rate, were still claimable under the charters of corporations to which fines had been granted. The only express exception—which is presumably the only exception intended—to the universal destination to the Sovereign and informer of all penalties and forfeitures under Acts relating to the revenue of excise is that

(1) 14 Q. B. D. 245.

1911

ATTORNEY-GENERAL v. EXETER CORPORATION.

Hamilton J.

contained in s. 103 of the Excise Management Act, 1827, namely, cases in which some Revenue Act has otherwise directed. On behalf of the defendants it was contended that sufficient effect can be given to the operation of s. 1 of the Inland Revenue Act, 1868, by saying that it was only intended to affect previous legislation in so far as that legislation divided the fine between the informer and the Crown, and that the words "anything in any Act to the contrary notwithstanding" are sufficiently satisfied by reading them as referring to provisions in previous statutes which said that instead of all going to the Crown part should go to the informer. I do not think that that is an interpretation which it is either necessary or reasonable to put upon those words, but when one recalls the fact that in 1827 there had been another precise enactment, inconsistent in its terms with any claim on the part of the city of Exeter and expressly preserving as exceptions cases—and cases alone—within which the city of Exeter does not come, it seems to me to be clear that the Legislature had by apt and sufficient words twice over at least precluded the city of Exeter from possessing any right, if right it previously had, to enjoy any of those revenue fines.

That being so, the decision of this case must be in favour of the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for H. Lloyd Parry, Exeter.*

J. E. A.

WALKER, Appellant *v.* RETTER, Respondent. 1911

March 23.

Landlord and Tenant — Distress for Rent—Charges—Man in Possession— Distress for Sum not exceeding 20l.—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1; *Schedule — Law of Distress Amendment Act*, 1888 (51 *&* 52 *Vict. c.* 21), *s.* 8 — *Distress for Rent Rules*, 1888, *rr.* 15, 16, *Appendix II., Scale II.*

By s. 1 of the Distress (Costs) Act, 1817, no person making a distress for rent where the sum demanded and due shall not exceed 20*l.* shall take other or more charges than those set forth in the schedule; and in the schedule the charge for "man in possession" is 2*s.* 6*d.* per day. By s. 8 of the Law of Distress Amendment Act, 1888, the Lord Chancellor may make rules "for regulating the fees, charges, and expenses in and incidental to distresses." By r. 15 of the Distress for Rent Rules, 1888, made by the Lord Chancellor under the above section, "no person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in and authorized by the table in Appendix II. to these rules"; and by r. 16, where the rent due exceeds 20*l.* the fees, charges, and expenses specified in scale I. shall be allowed, and where it does not exceed 20*l.* the fees, charges, and expenses specified in scale II. shall be allowed. Scale II. allows "for man in possession, 4*s.* 6*d.* per day: to provide his own board in every case":—

Held, that the Lord Chancellor had power under s. 8 of the Law of Distress Amendment Act, 1888, to make rules authorizing a scale of fees, charges, and expenses which should supersede the scale in the schedule to the Distress (Costs) Act, 1817, and that therefore the charge of 4*s.* 6*d.* per day for a man in possession authorized by the scale where the rent due did not exceed 20*l.* was not ultra vires.

Case stated by the stipendiary magistrate for the borough of East Ham.

The appellant was summoned to answer a claim by the respondent "for treble the amount of overcharges for man in possession had, taken, and received by the defendant (the appellant) as broker from the plaintiff (the respondent) as tenant on a distress for 8*l.* rent levied at 36, Church Road, Manor Park, of which premises the plaintiff was and is still the tenant, being the difference between 4*s.* 6*d.* per day for five days actually charged and 2*s.* 6*d.* per day allowed by the Distress (Costs) Act, 1817—1*l.* 10*s.*"

Upon the hearing the following facts were proved or admitted.

1911

WALKER v. RETTER.

The respondent was the tenant of the premises 36, Church Road, and on September 6, 1910, he owed his landlord the sum of 8*l.* for arrears of rent due in respect of the premises. On September 6, 1910, the landlord authorized the appellant, who was a bailiff duly appointed under the Law of Distress Amendment Acts, 1888 and 1895, to distrain the goods of the respondent upon the premises for the arrears of rent. The appellant on September 6, 1910, duly distrained upon certain of the respondent's goods upon the premises. Subsequently on the same day the appellant, pursuant to the terms of an agreement (1) signed by the appellant and respondent, withdrew from actual possession of the goods, but remained constructively in possession thereof for five days. Before the appellant withdrew from actual possession he demanded of the respondent and was paid by him, in addition to the levy fee, the sum of 1*l.* 2*s.* 6*d.* for five days' possession money at 4*s.* 6*d.* per day. It was admitted that the distress was perfectly regular and that possession of the goods in accordance with the terms of the agreement was duly kept for the five days in respect of which the charge of 1*l.* 2*s.* 6*d.* was made.

It was contended on behalf of the respondent that the charge of 4*s.* 6*d.* per day was contrary to the provisions of the Distress (Costs) Act, 1817 (2), under which, where the sum demanded and due did not exceed 20*l.*, the charge for a man in possession was limited to 2*s.* 6*d.* per day, and that any allowance

(1) The agreement was one commonly known as a "walking possession agreement": see *Lumsden* v. *Burnett*, [1898] 2 Q. B. 177.

(2) 57 Geo. 3, c. 93, s. 1, provides that no person making any distress for rent where the sum demanded and due shall not exceed 20*l.* shall have, take, or receive any other or more costs and charges for and in respect of such distress than such as are fixed and set forth in the schedule to the Act; and, s. 2, that if any person shall levy, take, or receive from any person any other or greater costs and charges than are mentioned and set down in the said schedule, the party aggrieved may apply to a justice of the peace; whereupon such justice shall summon the person complained of to appear before him, and if it shall appear that the person complained of shall have levied, taken, received, or had other and greater costs and charges than are mentioned or fixed in the schedule, such justice shall order and adjudge treble the amount of the moneys so unlawfully taken to be paid by the person having so acted to the party who shall have preferred the complaint, together with full costs.

The schedule specified, "Man in possession, per day 2*s.* 6*d.*"

1911

WALKER v. RETTER.

made by the Distress for Rent Rules, 1888 (1), in excess of that authorized by the Act of 1817 was ultra vires. The following cases (in addition to others referred to in the argument given hereunder) were cited: *Ex parte Arnison* (2); *Lumsden* v. *Burnett* (3); *Hawkins* v. *Gathercole.* (4)

It was contended on behalf of the appellant that the scale of costs now in force for distresses for rent where the sum demanded and due did not exceed 20*l.* was governed by the Distress for Rent Rules, 1888, made in pursuance of s. 8 of the Law of Distress Amendment Act, 1888, and that the rules and scales so made by the Lord Chancellor pursuant to the powers so conferred on him superseded and impliedly repealed so much of the Distress (Costs) Act, 1817, as was at variance with the said rules and scales, and therefore that the charge of 4*s.* 6*d.* per day made by the appellant was legally and properly made.

The magistrate was of opinion that the contention of the respondent was correct, and ordered the appellant to pay to the respondent the sum of 1*l.* 10*s.*, being treble the overcharge of 2*s.* per day for five days, together with 3*l.* 9*s.* costs.

The question for the opinion of the Court was whether the magistrate was right in holding that the amount properly payable by the respondent for possession money was governed by the Distress (Costs) Act, 1817, and was not governed by the rules and scales made under the Law of Distress Amendment Act, 1888.

(1) Law of Distress Amendment Act, 1888, s. 8: "After the passing of this Act the Lord Chancellor may from time to time make, alter, and revoke rules— . . . . (2.) For regulating the fees, charges, and expenses in and incidental to distresses . . . ."

Distress for Rent Rules, 1888 (made by the Lord Chancellor under the above power):

Rule 15: "No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in and authorized by the table in Appendix II. to these rules."

Rule 16: "Where the rent due exceeds 20*l.* the fees, charges, and expenses specified in scale I. shall be allowed, and where the rent due does not exceed 20*l.* the fees, charges, and expenses specified in scale II. shall be allowed."

Appendix II., scale II., contains the following item: "For man in possession, 4*s.* 6*d.* per day: to provide his own board in every case."

(2) (1868) L. R. 3 Ex. 56.

(3) [1898] 2 Q. B. 177.

(4) (1855) 6 De G. M. & G. 1.

1911

WALKER v. RETTER.

Danckwerts, K.C. (*Graham Mould* with him), for the appellant. Before the Law of Distress Amendment Act, 1888, any person might be authorized by the person to whom rent was due to act as bailiff to levy a distress for rent in arrear. Now by s. 7 of that Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as bailiff by a certificate of the county court judge. Therefore persons belonging to a limited class were alone authorized to act as bailiffs in levying distresses for rent, and s. 8 gave the Lord Chancellor power to make rules regulating the fees, charges, and expenses in and incidental to distresses. That is a general power to make rules in such a case, and the Distress for Rent Rules, 1888, made under it, provide for two scales of fees, charges, and expenses, one where the sum demanded and due exceeds 20*l.*, and the other where it does not. The scale provided in the schedule to the Distress (Costs) Act, 1817, related only to cases where the sum demanded and due did not exceed 20*l.*, and that scale is now superseded by scale II. in Appendix II. to the Rules of 1888. There is no ground for saying that that scale is ultra vires so far as it allows an increased fee for a man in possession. In *Robson* v. *Biggar* (1) it was assumed that the Act of 1888 gave power to vary the scale fixed by the Act of 1817. The decision of the magistrate was therefore wrong.

F. St. John Morrow, for the respondent. The preamble (2) to the Distress (Costs) Act, 1817, shews that it was passed to prevent brokers, distraining for rent, from making excessive charges, and accordingly a scale of charges is specified in the schedule where the distress is for a sum not exceeding 20*l.* This Act does not apply to a distress for a sum exceeding 20*l.*, in which case the charges must have been reasonable. That continued until the Law of Distress Amendment Act, 1888, which by s. 8 gave the Lord Chancellor power to make rules "for regulating the fees, charges, and expenses in and incidental to distresses." That Act did not repeal or in any way alter the Act of 1817, and the two Acts must be read together. "The law therefore will not allow the revocation or alteration of a statute by construction when the

(1) [1907] 1 K. B. 690, at p. 693.
(2) Now repealed by the Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51).

words may have their proper operation without it"; and "repeal by implication is not favoured": Maxwell on the Interpretation of Statutes, 4th ed., pp. 233, 247. "Where there are general words in a later Act, capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so": per Lord Selborne in *Seward* v. *Vera Cruz.* (1) Sect. 8 of the Act of 1888 may have full effect given to it by limiting it to the case of a distress for rent exceeding 20*l.*, which was not dealt with in the Act of 1817, and defining the scale of charges in such a case instead of leaving them to be ascertained from what is reasonable. Unless it is necessary to read the Act of 1888 as repealing the scale in the Act of 1817, it cannot be held as giving power to the Lord Chancellor to make rules allowing charges in excess of those permitted by the Act of 1817. *Coster* v. *Headland* (2) shews that the scale in the Act of 1817 is still in force. The Rules of the Supreme Court as to costs have been held not to repeal special statutes giving special costs in particular cases: *Hasker* v. *Wood* (3); *Reeve* v. *Gibson.* (4) The scale made by the Lord Chancellor under s. 8 of the Act of 1888 is repugnant to the provisions of the Act of 1817 and is ultra vires: *Hacking* v. *Lee* (5); *Irving* v. *Askew* (6); *Scott* v. *Denton* (7); Stone's Justices' Manual, 43rd ed., p. 698. The magistrate was therefore right in holding that the appellant was not entitled to charge more than 2*s.* 6*d.* per day for the five days during which the man was in possession of the goods distrained upon, and the respondent was entitled to recover the 1*l.* 10*s.* claimed and costs.

Danckwerts, K.C., was not called upon to reply.

LORD ALVERSTONE C.J. In this case the appellant was summoned before the magistrate under s. 2 of the Distress (Costs) Act, 1817, and was ordered to pay to the respondent the

(1) (1884) 10 App. Cas. 59, at p. 68.
(2) [1906] A. C. 286.
(3) (1885) 54 L. J. (Q.B.) 419.
(4) [1891] 1 Q. B. 652.
(5) (1860) 2 E. & E. 906, at p. 910 (per Crompton J.).
(6) (1870) L. R. 5 Q. B. 208, at p. 211.
(7) [1907] 1 K. B. 456, at p. 461.

1911

WALKER v. RETTER.

Lord Alverstone C.J.

sum of 1*l.* 10*s.*, being treble the amount of the excess over 2*s.* 6*d.* per day charged for five days' possession, upon the ground that the scale in force was that set out in the schedule to the Act of 1817, under which the charge allowed for a man in possession was 2*s.* 6*d.* per day, and that the charge of 4*s.* 6*d.* per day allowed by the Distress for Rent Rules, 1888, was ultra vires and illegal. There can be no doubt that if two statutes can properly be read together the Court ought to hold that there is no implied repeal of the earlier statute by the later. The question therefore is whether it was intended by the Law of Distress Amendment Act, 1888, to authorize a scale of charges which should supersede the items of charge specified in the schedule to the Act of 1817. In order to see whether that is or is not the effect of the Act of 1888 one must look at the scope and intention of the legislation. The title of the Act is "An Act to amend the Law of Distress for Rent." By s. 7 no person shall act as a bailiff to levy a distress for rent unless he shall be authorized to act as a bailiff by a certificate from the county court judge; and by s. 8, "the Lord Chancellor may from time to time make, alter, and revoke rules . . . . (2.) for regulating the fees, charges, and expenses in and incidental to distresses." Therefore a special class of persons are authorized to act as bailiffs to levy distresses for rent, and they are to receive such fees as the Lord Chancellor shall by rules allow. The rules framed by the Lord Chancellor under s. 8, where the sum demanded and due does not exceed 20*l.*, allow "for man in possession, 4*s.* 6*d.* per day: to provide his own board in every case," whereas under s. 1 of the Distress (Costs) Act, 1817, and the schedule thereto, where the sum demanded and due does not exceed 20*l.*, the sum allowed is, "man in possession, per day 2*s.* 6*d.*" When such a general power as that specified above is given by statute to the Lord Chancellor to make rules regulating the fees, charges, and expenses in and incidental to distresses, some strong ground ought to be shewn why that power should not have full effect given to it so as to enable rules to be made as to the scale of fees, charges, and expenses authorized to be taken in all cases by a bailiff levying a distress for rent. It is said that, as the charge of 2*s.* 6*d.* per day for a man in possession, where

1911

WALKER v. RETTER.

Lord Alverstone C.J.

the sum demanded and due does not exceed 20*l.*, was fixed by the Act of 1817, which is still in force, the Lord Chancellor had no power to alter or interfere with that charge in any rules which he might make under the Act of 1888. In my opinion that contention is not sound. One can well see why it may have been thought by the Legislature in 1888 that the scale fixed by the Act of 1817 was inapplicable to the circumstances of the later period. It is not an unreasonable view to take that the Legislature may have considered that after seventy years the scale of fees, charges, and expenses required revision, and deputed the task of revision to the Lord Chancellor; and I see no reason for holding that the fee for a man in possession in such a case as this is outside the scope of the rules to be made by the Lord Chancellor. If it could have been shewn that the scale fixed by the Act of 1817 was outside the purview of the Act of 1888, different considerations would have applied. In my opinion the general power given by s. 8 of the Act to the Lord Chancellor to make rules regulating the fees, charges, and expenses of a distress empowered him to make the scale of charges, specified in the Rules of 1888, which a bailiff may demand and take, and, that being so, the appellant did not commit an illegal act in demanding and taking 4*s.* 6*d.* per day for five days' possession money. The case of *Coster* v. *Headland* (1), to which reference has been made as supporting the respondent's contention, does not seem to me to have any bearing upon the question before us. The decision in that case was that the provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for poor rate, are not repealed by the Distress for Rates Act, 1849, s. 1. No question arose or could have arisen upon the Law of Distress Amendment Act, 1888, but I observe that Stirling L.J. in the Court of Appeal (2) pointed out that "as regards distresses for rent it is remarkable that, though subsequent legislation has given power to the Lord Chancellor to make general orders as to the charges to be levied in cases of distress for rent, the scale in the schedule to the Distress (Costs) Act, 1817, has, it appears, substantially been

(1) [1906] A. C. 286. (2) [1905] 1 K. B. 219, at p. 235.

1911

WALKER v. RETTER.

adopted in such orders." That seems to indicate a view certainly not inconsistent with that which we are now taking.

The decision of the magistrate was wrong, and the appeal must be allowed.

RIDLEY and CHANNELL JJ. agreed.

Appeal allowed.

Solicitor for appellant: *R. H. King.*
Solicitor for respondent: *C. Levick.*

W. F. B.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1911, will be as follows:—

In the First Series,
[1911] 1 Ch. [1911] 2 Ch.

In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
[1911] A. C.

INDEX.

ACCIDENT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ACTION—Cause of action—Injuria sine damno—Contract of towage—Tow sunk by negligence of third party—Loss to tug owner of towage remuneration - **243**
See NEGLIGENCE.

—— Limitation of.
See under LIMITATION OF ACTION.

ADMINISTRATION—*Right of Retainer—Administrator undischarged Bankrupt.*
An administrator who is an undischarged bankrupt has no right to retain, out of the assets received by him as administrator, a debt due to him from the deceased intestate. WILSON *v.* WILSON - - - - - **Channell J. 327**

ADMIRALTY.
See under SHIPPING.

AFFIDAVIT—Deed of arrangement—Registration—Validity—Affidavit sworn before solicitor to the parties—Bankruptcy notice - - - - - - - **317**
See BANKRUPTCY. 2.

AFFREIGHTMENT—Contract of—Bill of lading—Lien for dead freight—Deviation—Necessity for - - - - - **625**
See SHIPPING. 2.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGRICULTURAL HOLDINGS — Compensation for improvements—Market garden **797**
See LANDLORD AND TENANT. 1.

ALTERATION—Copyright—Picture—Reproduction without author's consent—"Alteration" - - - - - - - **771**
See COPYRIGHT.

APPEAL—Criminal law.
See under CRIMINAL LAW.

—— Order extending time for appealing—Practice - - - - - - - - **841**
See BANKRUPTCY. 1.

APPRENTICESHIP DEED—Infant—Breach of covenant—Injunction - - - **304**
See INFANT.

ARBITRATION—*Contract for Works—Action by Contractor—Reference of Disputes to Officer of other Contracting Party—Staying Proceedings—Attack on Conduct of Arbitrator—Discretion of Court—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.
Where a contractor brought an action to recover the price of certain works constructed for a local authority under a contract which provided for the reference of disputes thereunder to the engineer of the local authority, and, in answer to a summons to stay proceedings under s. 4 of the Arbitration Act, 1889, challenged the conduct of the engineer in relation to the works, the question in dispute being whether the engineer had not precluded himself by his own admissions from asserting that the works had not been completed to his satisfaction and that the period of maintenance had not expired:—
The Court (Cozens-Hardy M.R. and Buckley L.J.) (affirming the decision of Lush J.), in the exercise of the jurisdiction conferred upon it by the Arbitration Act, 1889, refused to order the action to be stayed; Cozens-Hardy M.R. on the ground that the cross-examination of the engineer was essential to the proper determination of the dispute; Buckley L.J. on the ground that, though in his opinion the evidence failed to shew that the engineer had unfitted himself to act as arbitrator, yet the fact that one judge of the Court of Appeal was not "satisfied that there was no sufficient reason why the matter should not be referred" was a ground upon which another judge of co-ordinate jurisdiction could concur in the view that an absence of a sufficient reason was not shewn. G. FREEMAN & SONS *v.* CHESTER RURAL COUNCIL - **C. A. 783**

—— Award—Action on—When statute begins to run—Compensation under Lands Clauses Act - - - - - **832**
See LIMITATION OF ACTION.

—— Lands Clauses Acts—Costs—Offer by promoters—Conditional offer - - **551**
See LANDS CLAUSES ACTS.

ARBITRATOR.
See under ARBITRATION.

ARRANGEMENT—Deed of.
See under DEED OF ARRANGEMENT.

ASPORTAVIT—Evidence of—Larceny - **674**
See CRIMINAL LAW. 4.

ASSIGNEE — Bankruptcy — Title of official assignee in New Zealand — Statutory assignee—Notice—Priorities - **896**
See BANKRUPTCY. 3.

ATTACHMENT — Solicitor—Costs—Taxation — Default in delivery of bill of costs—Motion for attachment - - **701**
See SOLICITOR. 3.

ATTORNEY-GENERAL—Criminal law—Appeal to House of Lords — Application to Attorney-General for certificate - **461**
See CRIMINAL LAW. 1.

—— Criminal law—Prosecution—Requisite consent of Attorney-General not obtained —Jurisdiction—Conviction - - **964**
See CRIMINAL LAW. 8.

—— Crown — Relief against the Crown — Declaratory judgment — Attorney-General defendant—Action on petition of right - - - - - **410**
See PRACTICE.

AWARD.
See under ARBITRATION.

BAILMENT — *Warehouseman — Negligence — Claim by Third Party to Goods bailed—Duty of Bailee—Notice of Claim to Bailor—Order by Magistrate that Goods be delivered to Third Party—Effect of—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 40.

The plaintiff, a married woman living apart from her husband, deposited certain goods belonging to her with the defendant, a warehouseman, the charge to be made by the defendant for the storage of the goods having been agreed upon between the plaintiff and the defendant. The plaintiff gave her address to the defendant. The plaintiff's husband subsequently went to the defendant's premises and claimed to be the owner of the goods, and, upon the defendant refusing to deliver them to him except under a magistrate's order, the husband and a representative of the defendant attended before a magistrate. The defendant's representative informed the magistrate that the goods had been deposited with the defendant by the plaintiff and that therefore the defendant for his protection required an order of the magistrate that he should deliver the goods to the husband. Thereupon a summons was issued by the magistrate under s. 40 of the Metropolitan Police Courts Act, 1839, against the defendant. The defendant did not give notice to the plaintiff that the husband claimed the goods. At the hearing of the summons the husband deposed that he was the owner of the goods and that they were worth 10*l.*, and the magistrate thereupon made an order that the defendant

BAILMENT—*continued.*

should deliver the goods to the husband. The defendant accordingly delivered the goods to the husband. The plaintiff subsequently brought an action in the county court, claiming from the defendant the return of the goods or their value and damages for their detention, and the county court judge directed the jury that the defendant would be responsible for the loss of the goods if he by his negligence allowed the magistrate's order to be made without giving notice to the plaintiff, whose address he knew, of her husband's claim to the goods or asking the magistrate to summon the plaintiff before him so that she might be heard. The jury found that there was negligence on the part of the defendant, and the county court judge thereupon gave judgment for the plaintiff. On appeal to the Divisional Court :—

Held by Phillimore and Bucknill JJ. (Darling J. doubting), that there was no duty on the defendant to do more than bring before the notice of the magistrate the fact that the goods had been deposited with him by the plaintiff, and that as he had done this there was no evidence of negligence on his part, and that judgment must therefore be entered for the defendant. RANSON *v.* PLATT - **Div. Ct. 499**

BANKRUPTCY—*Appeal—Practice—Order extending Time for appealing—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Appeals (County Courts) Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*a*).

Sect. 1, sub-s. 1 (*a*), of the Judicature (Procedure) Act, 1894, which provides that no appeal shall lie from an order allowing an extension of time for appealing from a judgment or order, applies to an order of a Divisional Court in bankruptcy extending the time for appealing from an order of the county court. *In re* A DEBTOR (No. 20 of 1910) - - - **C. A. 841**

2. —— *Deed of Arrangement — Registration — Validity — Affidavit sworn before Solicitor to the Parties — Bankruptcy Notice — Bankruptcy of Judgment Creditor — Devolution of Title — Leave to Trustee in Bankruptcy to issue Execution—Garnishee Order—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6—*Commissioners for Oaths Act*, 1889 (52 *Vict. c.* 10), *s.* 1, *sub-ss.* 2, 3—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Rules of the Supreme Court, Order XVII., r.* 4 ; *Order XXXVIII., r.* 16 ; *Order XLII., r.* 23.

In May, 1909, G. recovered judgment against B. for 550*l.* In July, M. & W., who were judgment creditors of G. for a larger amount, obtained a garnishee order nisi on the judgment recovered by G. against B., and in January, 1910, the garnishee order was made absolute. In December, 1909, M. & W. served a bankruptcy notice on G. in respect of their judgment debt, and in February, 1910, a receiving order was made against him founded on his non-compliance with the bankruptcy notice. In May, 1910, G.'s trustee in bankruptcy assented to a deed of arrangement entered into between B. and his creditors in October, 1909. In June, 1910,

BANKRUPTCY—*continued.*

having first obtained leave under Order XLII., r. 23, to issue execution on the judgment recovered by G. against B., he issued a bankruptcy notice against B. in respect of that judgment, and on his failure to comply with the notice presented a petition in bankruptcy against him. At the hearing it appeared that, although the deed of arrangement was in fact registered, one of the affidavits required by the Deeds of Arrangement Act, 1887, to be filed with the deed for the purposes of registration had been sworn before a commissioner for oaths who was solicitor to the trustee of the deed :—

Held—(1.) that the discharge of the garnishee order was not a condition precedent to the right of G.'s trustee in bankruptcy to issue a bankruptcy notice against B., inasmuch as the operation of the order was put an end to by the receiving order against G.

(2.) Applying *Baker* v. *Ambrose*, [1896] 2 Q. B. 372, that the deed of arrangement was void as it had not been registered in the manner provided by the Deeds of Arrangement Act, 1887, and that the assent of G.'s trustee in bankruptcy to the deed did not preclude him from issuing the bankruptcy notice.

(3.) Following the dictum of Cotton L.J. in *In re Woodall*, (1884) 13 Q. B. D. 479, and overruling the dictum of Wright J. in *In re Clements*, [1901] 1 K. B. 260, that it was not necessary for the trustee in bankruptcy before obtaining leave to issue execution on the judgment to be formally joined as a party to the proceedings under Order XVII., r. 4.

The disqualifying provision in sub-s. 3 of s. 1 of the Commissioners for Oaths Act, 1889, which prohibits a commissioner for oaths from exercising any of the powers given by the section "in any proceeding in which he is solicitor to any of the parties to the proceeding or clerk to any such solicitor, or in which he is interested," is not limited to proceedings in Court, but is co-extensive with the substantive provision in sub-s. 2, which empowers a commissioner for oaths to administer any oath or take any affidavit for the purposes of any Court or matter in England, including (inter alia) matters relating to the registration of any instrument. *In re* BAGLEY
C. A. 317

3. —— *Domicil—New Zealand Bankruptcy—Personalty in England — Subsequent English Bankruptcy—Title of Official Assignee in New Zealand—Statutory Assignees—Notice—Priorities—New Zealand Statutes, No.* 12 *of* 1908 (8 *Edw.* 7), *ss.* 53, 61.

In 1898 a debtor, whose domicil was English and who was entitled to a reversionary interest in personalty in England, was adjudicated bankrupt in New Zealand. In 1904 he was adjudicated bankrupt in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England, and he at once gave notice of his title to the trustees of the fund :—

Held, that the official assignee in New Zealand was entitled, as against the trustee in bankruptcy in England, to the reversionary interest.

BANKRUPTCY—*continued.*

In re Davidson's Settlement Trusts, (1873) L. R. 15 Eq. 383, and *In re Lawson's Trusts*, [1896] 1 Ch. 175, followed.

In re Blithman, (1866) L. R. 2 Eq. 23, and *In re Hayward*, [1897] 1 Ch. 905, discussed.

A statutory assignee who first gives notice of his title to the trustees of a fund obtains no priority by so doing over assignees for value, nor even over a prior statutory assignee who may not have given notice. *In re* ANDERSON
Phillimore J. 896

4. —— *Formation of Company—Fraudulent Promoter — Debenture Issue — Secret Profit—Bankruptcy of Promoter—Proof.*

A corporation consisted of only the seven signatories to its memorandum of association. It was formed by D. and G., two of the signatories, to cloak their identity in carrying on their financial operations, and they were the sole directors and managers of the corporation. The corporation then contracted to buy a licence to work a quarry for a small sum and promoted a company to acquire the licence, and the usual contracts were entered into by means of a trustee for the company whereby the corporation as vendors agreed to sell the licence to the company for 10,500*l.* in cash, 2000*l.* in debentures, and 5500*l.* in fully-paid shares of 1*l.* each of the company. D. and G. then caused the company to be registered and found the seven signatories to its memorandum of association and its directors, all of whom were their creatures. The company duly adopted the contract of sale and issued to the corporation 5500 fully-paid shares and 2000*l.* in debentures. D. and G. then prepared prospectuses which were issued by the company to the public inviting subscriptions to an issue of 2000 debentures of 10*l.* each, and as subscriptions came in the company paid the corporation some 9000*l.* cash (on account of the 10,500*l.*), which D. and G. then divided between themselves. The only shareholders of the company were the seven signatories to its memorandum and the corporation as holders of the 5500 shares. The contracts and prospectuses disclosed that the corporation was promoter and vendor to the company and was making the profit, but did not disclose the fact that D. and G. were the real promoters and vendors and were receiving the profit through the corporation. The company went into liquidation, and subsequently D. and G. became bankrupt. D. had assets, G. had none. They were prosecuted for fraudulent and material misstatements in the prospectuses and convicted :—

Held, that under the circumstances the corporation was only an "alias" for D. and G., and that the liquidator of the company could prove in the bankruptcy of D. for the whole of the secret cash profit that D. and G. had received. *In re* DARBY. *Ex parte* BROUGHAM
Phillimore J. 95

5.——*Judgment Debtor—Execution—Seizure by Sheriff—Claimant—Interpleader—Sale by Sheriff—Bankruptcy of Judgment Debtor—Costs of Execution — Sheriff's Costs of Interpleader —Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 119.

Goods of a judgment debtor which had been

BANKRUPTCY—*continued.*
seized by the sheriff under a writ of fi. fa. were claimed by a bill of sale holder and the sheriff interpleaded. On the hearing of the interpleader summons the claim was admitted and an order was made for the sale of the goods and for payment out of the proceeds of the claim of the bill of sale holder, the amount of the execution, and the costs of all parties, including the costs and charges of the sheriff. Before the sale, notice was served on the sheriff that a receiving order had been made against the judgment debtor :—

Held, that the sheriff's costs of the interpleader were not "costs of the execution" within s. 11 of the Bankruptcy Act, 1890, and consequently were not payable out of the debtor's estate.

Decision of Phillimore J., [1911] 1 K. B. 104, reversed on this point. *In re* ROGERS
C. A. 641

6. —— *Judgment Creditor—Writ of Fi. Fa.—Seizure by Sheriff—Claimant—Interpleader Summons — Sale by Sheriff — Bankruptcy of Execution Debtor — "Costs of Execution"—Sheriff's Costs of Interpleader — Execution Creditor's Costs — Practice — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 118, 119.

A bill of sale holder claimed goods of a judgment debtor which the sheriff had seized under a writ of fi. fa., and the sheriff interpleaded. On the hearing of the interpleader summons the validity of the bill of sale was admitted and an order was made for the sale of sufficient goods to pay the claim and the claimant's costs, the execution creditor's costs, and the sheriff's costs, and for payment of the balance to the execution debtor. Pending the sale the execution debtor became bankrupt, and the official receiver stopped the sale before it was completed :—

Held, that the sheriff's costs of the interpleader were "costs of the execution" within the meaning of s. 11 of the Bankruptcy Act, 1890; but that the claimant's costs and the execution creditor's costs of the interpleader were not "costs of the execution" within that section which the sheriff could deduct from the proceeds of sale as against the official receiver. *In re* ROGERS. *Ex parte* SHERIFF OF SUSSEX
Phillimore J. 104

—— Retainer, Right of—Administrator undischarged bankrupt - - - **327**
See ADMINISTRATION.

BANKRUPTCY RULES, 1886 and 1890, rr. 118, 119 - - - - - - - **104**
See BANKRUPTCY. 6.

—— r. 119 - - - - - - - **641**
See BANKRUPTCY. 5.

BETTING—*Ground used for the Purpose of a Racecourse—Street Betting Act*, 1906 (6 *Edw.* 7, *c.* 43), *s.* 2.

A field was being used on a particular day for certain mixed sports consisting partly of foot races and other athletic competitions and partly of horse races. The field was not permanently laid out as a racecourse, but was only temporarily adapted for the purpose of horse racing for the particular occasion :—

Held, that it was not "ground used for the purpose of a racecourse for racing with horses" within the meaning of s. 2 of the Street Betting Act, 1906, so as to exclude the application to it of the provisions of that Act. STEAD *v.* AYKROYD
Div. Ct. 57

—— Criminal law—Betting—User of premises—Evidence—Receipt of money - **70**
See CRIMINAL LAW. 2.

BICYCLE—Workmen's compensation—Collector—Bicycle accident - - - **997**
See EMPLOYER AND WORKMAN. 2.

BILL OF COSTS—Solicitor.
See under SOLICITOR.

BILL OF EXCHANGE — Promissory note — Signature procured by duress—Knowledge of duress by holder of instrument—Burden of proof - - - **854**
See NEGOTIABLE INSTRUMENT.

BILL OF SALE—Pawnbroker—Loan of 50*l.* on bill of sale—Business of money-lending
See PAWNBROKER. **792**

BORROWING POWERS—Local government—Urban authority—Security for loan
See CORPORATION. **680**

BUILDING—London.
See under LONDON.

—— Means of escape in case of fire—Public-house - - - - - - - **235**
See LONDON.

BURGLARY INSURANCE.
See under INSURANCE (BURGLARY).

CALLS — Company — Unpaid calls — Notice to forfeit shares — Interim injunction restraining forfeiture - - - **455**
See COMPANY. 1.

CANCELLATION—Lease, Cancelling agreement for — County court — Equitable jurisdiction - - - - - **666**
See LANDLORD AND TENANT. 3.

CARETAKER—School—Duty to maintain and keep efficient—Appointment and payment of caretaker - - - **222**
See SCHOOLS. 2.

CARRIAGE OF GOODS—Railway company.
See under RAILWAY.

CARRIAGES—Licence.
See under REVENUE.

CASES :—

—— *Baker* v. *Ambrose* - [1896] 2 Q. B. 372
Applied by C. A. *In re* BAGLEY
[1911] 1 K. B. 317

CASES—*continued.*

—— *Bennetts & Co.* v. *Brown*, [1908] 1 K. B. 490.
Referred to by C. A. BRITISH AND MEXICAN SHIPPING COMPANY *v.* LOCKETT BROTHERS & CO.
[1911] 1 K. B. 264

—— *Berdsley* v. *Pilkington*, (1588) Goulsborough, 100.
Opinion of the Serjeants in, affirmed by Div. Ct. COAKER *v.* WILLCOCKS
[1911] 1 K. B. 649

—— *Biddell Brothers* v. *E. Clemens Horst Co.*, [1911] 1 K. B. 214.
Reversed by C. A. - [1911] 1 K. B. 934

—— *Blithman, In re* - (1866) L. R. 2 Eq. 23
Discussed by Phillimore J. IN RE ANDERSON - - [1911] 1 K. B. 896

—— *Cattle* v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453.
Followed by Hamilton J. LA SOCIÉTÉ ANONYME DE REMORQUAGE À HÉLICE *v.* BENNETTS - [1911] 1 K. B. 243

—— *Child* v. *Hearn* - (1874) L. R. 9 Ex. 176
Followed by Div. Ct. COAKER *v.* WILLCOCKS - - [1911] 1 K. B. 649

—— *Clark* v. *Gas Light and Coke Co.*, (1905) 7 W. C. C. 119.
Explained and distinguished by C. A. CARDIFF CORPORATION *v.* HALL
[1911] 1 K. B. 1009

—— *Clements, In re* - - [1901] 1 K. B. 260
Dictum of Wright J. in, overruled by C. A. *In re* BAGLEY
[1911] 1 K. B. 317

—— *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869.
Discussed by C. A. KEELING *v.* NEW MONCKTON COLLIERIES, LIMITED
[1911] 1 K. B. 250

—— *Davidson's Settlement Trusts, In re*, (1873) L. R. 15 Eq. 383.
Followed by Phillimore J. *In re* ANDERSON - - [1911] 1 K. B. 896

—— *Ebbetts* v. *Conquest* - [1895] 2 Ch. 377
Dictum of Lindley L.J. in, followed by Lord Coleridge J. CLARE *v.* DOBSON
[1911] 1 K. B. 35

—— *Fisher* v. *Great Western Ry. Co.*, [1910] 2 K. B. 242.
Affirmed - - [1911] 1 K. B. 551

—— *Foster* v. *Mackinnon*, (1869) L. R. 4 C. P. 704.
Explained by C. A. CARLISLE AND CUMBERLAND BANKING COMPANY *v.* BRAGG - - [1911] 1 K. B. 489

—— *Freston, In re* - (1883) 11 Q. B. D. 545
Considered by C. A. SELDON *v.* WILDE
[1911] 1 K. B. 701

—— *Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255.
Opinions expressed in, followed by C. A. KINGSTON-UPON-HULL INCORPORATION FOR THE POOR *v.* HACKNEY UNION - - - [1911] 1 K. B. 748

CASES—*continued.*

—— *Gibson* v. *Barton*, (1875) L. R. 10 Q. B. 329.
Followed by Div. Ct. PARK *v.* LAWTON - - - [1911] 1 K. B. 588

—— *Glamorgan County Asylum* v. *Cardiff Union*, [1910] 2 K. B. 547.
Affirmed by C. A. - [1911] 1 K. B. 437

—— *Harnett* v. *Miles* - (1884) 48 J. P. 455
Followed by Div. Ct. COOK *v.* TREVENER - - [1911] 1 K. B. 9

—— *Hayward, In re* - - [1897] 1 Ch. 905
Discussed by Phillimore J. *In re* ANDERSON - - - [1911] 1 K. B. 896

—— *Hodge* v. *Attorney-General*, (1838) 3 Y. & C. Ex. 342.
Examined and approved by C. A. DYSON *v.* ATTORNEY-GENERAL
[1911] 1 K. B. 410

—— *Hodgson* v. *West Stanley Colliery*, [1910] A. C. 229.
Discussed by C. A. KEELING *v.* NEW MONCKTON COLLIERIES, LIMITED
[1911] 1 K. B. 250

—— *Hyams* v. *Stuart King* - [1908] 2 K. B. 696
Distinguished by Hamilton J.
[1911] 1 K. B. 137

—— *Kinahan & Co.* v. *Parry* - [1910] 2 K. B. 389
Reversed by C. A. - [1911] 1 K. B. 459

—— *Kish* v. *Taylor* - - [1910] 2 K. B. 309
Appeal allowed. Cross-appeal dismissed. C. A. - [1911] 1 K. B. 625

—— *Lawson's Trust, In re* - [1896] 1 Ch. 175
Followed by Phillimore J. *In re* ANDERSON - - [1911] 1 K. B. 896

—— *Legge* v. *Croker* - (1811) 1 Ball & B. 506
Followed by Div. Ct. ANGEL *v.* JAY
[1911] 1 K. B. 666

—— *Lister* v. *Lane* - - [1893] 2 Q. B. 212
Distinguished by C. A. LURCOTT *v.* WAKELY & WHEELER
[1911] 1 K. B. 905

—— *London Scottish Benefit Society* v. *Chorley*, (1884) 13 Q. B. D. 872.
Discussed by Div. Ct. H. TOLPUTT & Co. *v.* MOLE - - [1911] 1 K. B. 87

—— *McNeice* v. *Singer Sewing Machine Co.*, 1911 S. C. 12.
Followed by C. A. PIERCE *v.* PROVIDENT CLOTHING AND SUPPLY COMPANY
[1911] 1 K. B. 997

—— *Manchester Ship Canal Co.* v. *London and North Western Ry. Co.*, [1910] 2 K. B. 913.
Affirmed by C. A. - [1911] 1 K. B. 657

—— *Metropolitan Water Board* v. *Brooks*, [1910] 2 K. B. 134.
Decision of Channell J. affirmed on different grounds by C. A.
[1911] 1 K. B. 289

CASES—*continued.*

—— *Moore* v. *Manchester Liners, Ld.*, [1909] 1 K. B. 417; [1910] A. C. 498.
Discussed and explained by C. A. KITCHENHAM *v.* OWNERS OF S.S. JOHANNESBURG. LEACH *v.* OAKLEY STREET & CO. - [1911] 1 K. B. 523

—— *Osmond* v. *Campbell & Harrison, Ld.*, [1905] 2 K. B. 852.
Applied by C. A. HALL *v.* TAMWORTH COLLIERY COMPANY
[1911] 1 K. B. 341

—— *Prested Miners Co.* v. *Gardner, Ld.*, [1910] 2 K. B. 776.
Affirmed by C. A. - [1911] 1 K. B. 425

—— *Proctor & Sons* v. *Robinson*, (1909) [1911] 1 K. B. 1004.
Explained and distinguished by C. A. CARDIFF CORPORATION *v.* HALL
[1911] 1 K. B. 1009

—— *Rex* v. *Locke* - - [1910] 2 K. B. 201
Reversed, on a further agreed statement of facts, by C. A. - [1911] 1 K. B. 680

—— *Rex* v. *Munday*, (1799) 2 Leach, C. C. 850.
Followed by C. C. A. REX *v.* RICHARDS
[1911] 1 K. B. 260

—— *Rex* v. *Russell* - - (1827) 6 B. & C. 566
Discussed and disapproved by C. A. DENABY AND CADEBY MAIN COLLIERIES, LIMITED *v.* ANSON
[1911] 1 K. B. 171

—— *Ripley* v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327.
Disapproved of by C. A. JONES *v.* PACAYA RUBBER AND PRODUCE COMPANY - - - [1911] 1 K. B. 455

—— *Robinson Printing Co.* v. *Chic, Limited*, [1905] 2 Ch. 123.
Followed by C. A. DEYES *v.* WOOD
[1911] 1 K. B. 806

—— *Rogers, In re* - - [1911] 1 K. B. 104
Reversed on one point by C. A.
[1911] 1 K. B. 641

—— *Seldon* v. *Wilde* - - [1910] 2 K. B. 9
Affirmed by C. A. - [1911] 1 K. B. 701

—— *Shenstone & Co.* v. *Freeman*, [1910] 2 K. B. 84.
Followed by C. A. ROGERS, EUNGBLUT & CO. *v.* MARTIN
[1911] 1 K. B. 19

—— *Spillers & Bakers, Ld.* v. *Great Western Ry. Co.*, [1910] 1 K. B. 778.
Affirmed by C. A. - [1911] 1 K. B. 386

—— *Strang, Steel & Co.* v. *A. Scott & Co.*, (1889) 14 App. Cas. 601.
The principle of, applied by C. A. KISH *v.* TAYLOR - [1911] 1 K. B. 625

—— *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494.
Overruled by C. A. GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) *v.* CARDIFF GUARDIANS
[1911] 1 K. B. 437

CASES—*continued.*

—— *Thacker* v. *Hardy*, (1878) 4 Q. B. D. 685, 695.
The definition of gaming and wagering by Cotton L.J. in, considered by Channell J. RICHARDS *v.* STARCK
[1911] 1 K. B. 296

—— *Tolputt (H.) & Co.* v. *Mole*, [1911] 1 K. B. 87
Affirmed by C. A. - [1911] 1 K. B. 836

—— *Torrens* v. *Walker* - [1906] 2 Ch. 166
Distinguished by C. A. LURCOTT *v.* WAKELY & WHEELER
[1911] 1 K. B. 905

—— *United Mining and Finance Corporation, Ld.* v. *Becher*, [1910] 2 K. B. 296.
On appeal, *see* C. A.
[1911] 1 K. B. 840

—— *Vimbos, Limited, In re* - [1900] 1 Ch. 470
Followed by C. A. DEYES *v.* WOOD
[1911] 1 K. B. 806

—— *Warner* v. *Couchman* - [1911] 1 K. B. 351
Distinguished by C. A. PIERCE *v.* PROVIDENT CLOTHING AND SUPPLY COMPANY - - [1911] 1 K. B. 997

—— *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450.
Opinions expressed in, followed by C. A. KINGSTON-UPON-HULL INCORPORATION FOR THE POOR *v.* HACKNEY UNION - - - [1911] 1 K. B. 748

—— *Williams* v. *Ocean Coal Co.*, [1907] 2 K. B. 422.
Discussed by C. A. KEELING *v.* NEW MONCKTON COLLIERIES, LIMITED
[1911] 1 K. B. 250

—— *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 7.
Judgment of Lord Atkinson in, explained by Div. Ct. LIVERPOOL CORPORATION *v.* CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS - [1911] 1 K. B. 1057

—— *Woodall, In re* - (1884) 13 Q. B. D. 479
Dictum of Cotton L.J. in, followed by C. A. *In re* BAGLEY
[1911] 1 K. B. 317

CHARTER—Grant by charter of revenue fine to corporation—Repeal of grant by Revenue Acts—Crown - - 1092
See REVENUE. 3.

CHARTERPARTY—Shipping.
See under SHIPPING.

CINEMATOGRAPH—*Licence—Condition as to closing on Sundays, Good Friday, and Christmas Day — Validity — Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2.

A county council, in granting a licence under s. 2 of the Cinematograph Act, 1909, to use certain premises for a cinematograph exhibition, for the purposes of which inflammable films are used, have power to insert therein a condition that the premises shall not be opened under the licence on Sundays, Good Friday, and Christmas Day. LONDON COUNTY COUNCIL *v.* BERMONDSEY BIOSCOPE COMPANY - - Div. Ct. 445

COAL—Harbour—Right of shipowner to moor coal hulk in navigable harbour—Trespass - - - - - - - **171**
See HARBOUR.

COLLECTOR — Workmen's compensation — Bicycle accident - - - - **997**
See EMPLOYER AND WORKMAN. 2.

COMMON—*Dartmoor Forest—Newtake—Duty to fence—Sheep Damage Feasant—Impounding—Pound more than Three Miles distant*—1 & 2 *Ph. & M. c.* 12, *s.* 1—*Distress.*

The defendant was the occupier of a newtake formerly part of the Forest of Dartmoor, and was bound to fence his land against moorland cattle, including sheep :—

Held, that he was not bound to fence against sheep of a peculiarly wandering and active disposition.

Principle of *Child* v. *Hearn*, (1874) L. R. 9 Ex. 176, followed.

By s. 1 of the statute 1 & 2 Ph. & M. c. 12, it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is taken, except it be to a pound overt within the said shire not above three miles distant from the place where the distress is taken :—

Held, that the words "not above three miles" &c. do not qualify the distrainor's right to drive the distress to any pound within the hundred, rape, &c.

Opinion of the Serjeants in *Berdsley* v. *Pilkington*, (1588) Gouldsborough, 100, affirmed.
COAKER *v.* WILLCOCKS - - **Div. Ct. 649**

COMPANY — *Action to rescind Contract for Shares—Unpaid Calls—Notice to forfeit Shares—Interim Injunction restraining Forfeiture.*

If, while an action is pending against a company for the rescission of a contract to take shares, the company give notice to the plaintiff to forfeit the shares in consequence of non-payment of calls, the Court will, on the plaintiff paying into Court the amount of the call with interest, restrain the company until the trial of the action from forfeiting the shares.

Ripley v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327, disapproved of. JONES *v.* PACAYA RUBBER AND PRODUCE COMPANY, LIMITED
C. A. 455

2. —— *Debentures—Receiver—Appointment of Receiver by Debenture-holders—Remuneration, by whom payable—Receiver Agent of Debenture-holders—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-ss.* 1, 2, 3 ; *s.* 24, *sub-ss.* 2, 6.

By debentures issued by a company, its undertaking and all its property, both present and future, were charged with payment of the debenture debts, and, by a condition indorsed on and forming part of the debentures, it was provided that "at any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of the same issue, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment : and a receiver so appointed shall have power (1.) to take possession of, collect, and get in the property charged by the debentures, and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient, (2.) to carry on, or concur in carrying on, the business of the company, and for that purpose to raise money on the premises charged in priority to the debentures, (3.) to sell, or concur in selling, any of the property charged by the debentures after giving to the company at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company, (4.) to make any arrangement or compromise which he or they shall think expedient in the interests of the debenture-holders ; and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction pari passu of the debentures ; and the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections of the said Act, which provisions so varied and extended shall be regarded as incorporated herein."

The principal moneys secured by the debentures having become payable, a receiver was appointed by holders of the majority in value of the outstanding debentures under the above-mentioned condition. In an action by the receiver against the debenture-holders by whom he was appointed for remuneration in respect of services rendered by him as such receiver :—

Held, upon the terms of the before-mentioned condition in the debentures, that, in rendering those services, the receiver was acting as agent of the debenture-holders by whom he was appointed, and not of the company, and that he was therefore entitled to remuneration from the debenture-holders.

In re Vimbos, Limited, [1900] 1 Ch. 470, and *Robinson Printing Co.* v. *Chic, Limited*, [1905] 2 Ch. 123, followed. DEYES *v.* WOOD
C. A. 806

3. —— *List of Members—Default in sending to Registrar—No Annual General Meeting—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 26, 64.

The respondents, two directors of a company, were charged with an offence under s. 26 of the Companies (Consolidation) Act, 1908, in that they knowingly and wilfully permitted default to be made by the company in forwarding to the Registrar of Companies a copy of its list of members, with summary as to capital and shares, &c., for the year 1909, as required by s. 26, which provides that a company "shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only general meeting in the year, are

COMPANY—*continued.*
members of the company," which list, containing the various particulars specified in the section, must be completed "within seven days after the fourteenth day aforesaid," and a copy thereof is to be forwarded forthwith to the Registrar.

No general meeting of the company had been held during the year 1909, and the respondents had been knowingly parties to the default of the company in that respect:—

Held, that the fact that no general meeting had been held was in the circumstances no defence to the charge of not complying with the requirements of s. 26.

Gibson v. *Barton*, (1875) L. R. 10 Q. B. 329, followed. PARK *v.* LAWTON - **Div. Ct. 588**

—— Promoter — Formation of company — Fraudulent promoter—Bankruptcy of promoter—Proof - - - - **95**
See BANKRUPTCY. 4.

COMPENSATION — Lands Clauses Act, Compensation under—Award—Action on—When statute begins to run - - **832**
See LIMITATION OF ACTION.

—— Market garden—Compensation for improvements—Agricultural holdings - **797**
See LANDLORD AND TENANT. 1.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITIONAL OFFER—Lands Clauses Acts—Arbitration—Costs—Offer by promoters
See LANDS CLAUSES ACTS. **551**

CONSENT—Attorney-General.
See under CRIMINAL LAW.

CONTRACT—*Fraud—Sale of Goods—Voidable Contract—Pledge by Purchaser—Transferee in Good Faith and without Notice—Onus of Proof—Criminal Law—Larceny by a Trick—Goods on Sale or Return—Power given to pass Property in Goods—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 23.

Where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, and, before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the onus lies on the seller who seeks to avoid the sale, and recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith.

Semble that, where the owner of an article is induced, by a false representation made by another with fraudulent intent that he has a customer who desires to purchase such an article, to deliver the article to that other on sale or return for the purpose of his endeavouring to get the supposed customer to buy it from him, the case is one not of larceny by a trick, but of obtaining goods by fraud. WHITEHORN BROTHERS *v.* DAVISON - - - **C. A. 463**

2. —— *Signature to Document obtained by Fraud—Document signed in Ignorance of Contents—Guarantee—Defence of non est factum—Negligence—Estoppel—Proximate Cause of Loss.*

The defendant signed a document, which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R. of any sum which might at any time thereafter be or become due from R. to the plaintiffs, a banking company, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of R. to sign the document, without reading it, and not knowing that it was a guarantee, but supposing it to be a document of a different character. Subsequently to the signature of the document by the defendant, R. forged the signature of an attesting witness to it, and handed it to the plaintiffs. The jury, in answer to a question put to them by the judge, found that the defendant was negligent in signing the document:—

Held, affirming the decision of Pickford J., that in an action on the supposed guarantee the defendant was not estopped from denying that he had contracted to guarantee the debt of R., inasmuch as he was under no duty to the plaintiffs in the matter, and the proximate cause of the plaintiffs' loss was the fraudulent action of R. and not the defendant's supposed negligence.

Foster v. *Mackinnon*, (1869) L. R. 4 C. P. 704, discussed. CARLISLE AND CUMBERLAND BANKING COMPANY *v.* BRAGG - **C. A. 489**

—— Sale of goods.
See under SALE OF GOODS.

—— Sale of goods—Act done by plaintiff in mitigation of damages — Relevancy
See DAMAGES. **575**

CONTRACTOR—Contract for works—Reference of disputes to officer of other contracting party—Staying proceedings—Attack on conduct of arbitrator - - - **783**
See ARBITRATION.

CONVEYANCING AND LAW OF PROPERTY—Company—Debentures — Receiver — Remuneration, by whom payable - **806**
See COMPANY. 2.

COPYRIGHT — *Picture — Drawing—Reproduction without Author's Consent—"Alteration"—Coloured Enlargement — Penalties — Action to recover—Injunction—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 7, 8.

By s. 7 of the Fine Arts Copyright Act, 1862, (1.) no person shall fraudulently affix upon any painting, drawing, or photograph any name, initials, or monogram; (2.) no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph having thereon the name, initials, or monogram of a person who did not execute or make such work; (3.) no person shall fraudulently utter, dispose of, or put off any copy or colourable imitation of any painting, drawing, or photograph as having been made or executed by the author or maker of the original work; (4.) "Where the author or maker of any painting, drawing, or photograph . . . .

COPYRIGHT—*continued.*
shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker."

"Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds . . . ."

By s. 8, all pecuniary penalties which shall be incurred pursuant to the Act may be recovered either by action against the party offending, or by summary proceeding before two justices.

In order to constitute an "alteration" in a drawing within the meaning of s. 7, clause 4, the alteration must be a material one having regard to the object of the enactment. An alteration in a drawing which might affect the reputation of the author of the drawing as an artist would be a material alteration and would therefore come within the section. To bring the case within the clause it is not necessary that the sale or publication of the altered work should be fraudulent; it is sufficient if the sale or publication of the altered work as or for the unaltered work of the author is made knowingly.

The plaintiff, who was an artist, made a fine line drawing, which bore his signature, for the defendants for the purpose of being used by them as an advertisement for a certain preparation in which they dealt. The defendants, in whom the copyright of the drawing vested, had the drawing, without the plaintiff's consent, enlarged and coloured, and caused copies of the enlargement with the plaintiff's name thereon to be exhibited in the form of posters as an advertisement of their preparation. In an action by the plaintiff to recover a penalty for infringement of s. 7, clause 4, of the Act by the publication of copies of the drawing so altered as or for the unaltered work of the plaintiff, and for an injunction, evidence was given that the alteration and colouring of the drawing were such as would be damaging to the plaintiff's reputation as an artist:—

Held, that as the alteration in the drawing might be damaging to the plaintiff's reputation as an artist, the defendants had committed a breach of s. 7, clause 4; that the plaintiff was entitled to bring an action, under s. 8, to recover a penalty for the breach; and that the plaintiff was also entitled to an injunction to restrain future breaches. CARLTON ILLUSTRATORS *v.* COLEMAN & CO. - - - **Channell J. 771**

CORPORATION — *Borrowing Powers — Local Government — Municipal Corporation — Urban Authority—Security for Loan — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 233.

Quære, whether the borrowing powers conferred upon an urban authority by s. 233 of the Public Health Act, 1875, enable it to borrow or reborrow money (for other than temporary purposes) without securing the repayment of the

CORPORATION—*continued.*
loan by a mortgage of the rates or fund on the credit of which the money is borrowed.

Decision of the Divisional Court, [1910] 2 K.B. 201, reversed on a further agreed statement of facts, upon which the Court of Appeal held that there was no reborrowing by the urban authority, but merely a transfer of an old loan. THE KING *v.* LOCKE - - - - - - **C. A. 680**

—— Grant by charter of revenue fine to corporation—Repeal of grant by Revenue Acts—Crown - - - - - - **1092**
See REVENUE. 3.

COSTS—Distress for rent—Charges—Man in possession—Distress for sum not exceeding 20*l.* - - - - - - **1103**
See LANDLORD AND TENANT. 2.

—— Interpleader—Judgment debtor—Execution—Costs of execution—Sale by sheriff
See BANKRUPTCY. 5. **641**

—— Lands Clauses Acts—Arbitration—Offer by promoters—Conditional offer - **551**
See LANDS CLAUSES ACTS.

—— Lease—Underlease—Covenants to repair in similar terms—Breach by lessee—Forfeiture—Relief—Breach by underlessee
See LANDLORD AND TENANT. 5. **35**

—— Solicitors'.
See under SOLICITOR.

COUNTY COURT—Bankruptcy—Appeal—Practice — Order extending time for appealing - - - - - - **841**
See BANKRUPTCY. 1.

—— Equitable jurisdiction—Cancelling agreement for lease—"Value of the property"
See LANDLORD AND TENANT. 3. **666**

—— Registrar of county court — Defendant in person—Taxation—Costs as solicitor—Registrar acting as solicitor in his own Court - - - - - - - **836**
See SOLICITOR. 4.

—— Registrar of—Defendant in person—Taxation—Costs as solicitor - - **87**
See SOLICITOR.

—— Workmen's compensation—Jurisdiction of county court judge - - - **24**
See EMPLOYER AND WORKMAN. 3.

COUNTY COURT RULES, 1903—1908, ORDER LIII., r. 25 - - - **836**
See SOLICITOR. 4.

COVENANT — Infant — Apprenticeship deed — Breach of covenant—Injunction - **304**
See INFANT.

—— Lease—Forfeiture — Relief—Costs—Breach by underlessee - - - - - **35**
See LANDLORD AND TENANT. 5.

—— Repairs—Old building—Natural decay—Dangerous structure notice—Rebuilding—Liability of lessee - - - - **905**
See LANDLORD AND TENANT. 6.

CRIMINAL LAW—*Appeal—Incest—Evidence to prove previous Relations — Admissibility — Punishment of Incest Act*, 1908 (8 *Edw.* 7, *c.* 45), *ss.* 1, 2—*Conviction quashed—Appeal to House of Lords — Application to Attorney-General for Certificate—Power of Court as to Custody of Defendant—Reversal of Order of Court of Criminal Appeal—Power of Court to restore Conviction—Practice of the House of Lords—Printing Papers—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1, *sub-ss.* 6, 7; *s.* 4, *sub-s.* 2; *and s.* 9.

There being no rules of the House of Lords in respect of criminal appeals, the House on presentation of such an appeal will order the same to be read and prosecuted subject to such standing orders as may be applicable thereto and to the requirement that the respondent to such an appeal shall "lodge a case forthwith in answer thereto"; and the House will accept type-written copies of the papers necessary to the disposal of the appeal, the petition of appeal alone being printed.

The defendants, who were brother and sister, were indicted under the Punishment of Incest Act, 1908, for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the defendants were seen together at night in the same house, which contained only one furnished bedroom; and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of the defendants with the view of shewing what were the relations between them. This evidence was objected to, but was admitted. The evidence was to the effect that the male defendant in November, 1907, took a house to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth, describing herself as the mother and the male defendant as the father. The defendants having been convicted, they appealed, and the Court of Criminal Appeal quashed the conviction and directed a "judgment and verdict of acquittal to be entered," on the ground that the evidence objected to was not in the first instance admissible, and that nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal:—

Held by the House of Lords, reversing the order of the Court of Criminal Appeal, that the evidence objected to was admissible on the issue; for the object of that evidence was to establish that the defendants had a guilty passion towards each other and to rebut the defence of innocent association as brother and sister.

Held by the Court of Criminal Appeal, that the Court has no power to hold a defendant, whose conviction has been quashed, to bail or to keep him in custody pending an application by the Director of Public Prosecutions or the prosecutor to the Attorney-General, under s. 1, sub-s. 6 of the Criminal Appeal Act, 1907, for his certificate that the decision of the Court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought to the House of Lords, or pending an appeal if the certificate is granted.

Held, also, by the Court of Criminal Appeal, that the Court had power to give effect to the decision of the House of Lords by making an order dismissing the original appeal against the conviction and restoring the conviction, and to issue a warrant for the arrest of the defendant who had been discharged from custody. THE KING *v.* WILLIAM HENRY BALL. THE KING *v.* EDITH LILIAN BALL

H. L. (Criminal Appeal) 461

[For the full report see [1911] A. C. 47.]

CRIMINAL LAW—*continued.*

2. —— *Betting — User of Premises — Evidence—Receipt of Money — Consideration — Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The appellant, a bookmaker, was convicted on an indictment charging him under s. 3 of the Betting Act, 1853, with having used his premises for the purpose of money being received by him "as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter" money on bets on horse races.

Evidence was given on behalf of the prosecution that, at the time alleged in the indictment, postal orders for 5*l.* were sent to and retained by the appellant in pursuance of a letter previously received in which the writer stated that he desired to open a deposit account with the appellant and that his commissions would not exceed 5*l.* without a further remittance; that bets to an amount not exceeding 5*l.* were subsequently made by the appellant with the sender of the postal orders and an account shewing the sums won or lost was sent to him; and that a few days later the appellant's premises were searched by the police, and betting slips and ledgers containing entries relating to the bets were found there:—

Held, that there was evidence on which the jury were entitled to convict the appellant. THE KING *v.* MORTIMER - - **C. C. A. 70**

3. —— *Conviction on Indictment — Conditional Discharge—Recognizance to appear for Sentence — Breach of Condition — Power of Quarter Sessions to sentence—Inherent Jurisdiction—Probation of Offenders Act*, 1907 (7 *Edw.* 7, *c.* 17), *ss.* 1, 6.

The appellant having been convicted of larceny at quarter sessions was discharged conditionally under s. 1, sub-s. 2, of the Probation of Offenders Act, 1907, on his entering into a recognizance, subject to certain conditions authorized in the circumstances by the Act, to appear for sentence when called upon at any time during a specified period. The appellant committed a breach of one of the conditions of the recognizance, and was in consequence called upon to appear before the quarter sessions for sentence. It was contended for the appellant that s. 6, sub-s. 5, of the Act only applied to cases where a defendant had been bound over by a Court of summary jurisdiction under s. 1, sub-s. 1, of the Act to appear for conviction and

sentence, and that quarter sessions had, therefore, no power to sentence the appellant. Quarter sessions having stated a case for the opinion of the Court :—

Held, that quarter sessions had power to sentence the appellant, for, assuming, as appeared probable, that there was no power to do so under s. 6, sub-s. 5, Courts of quarter sessions have always had, as part of their inherent jurisdiction, power to order a convicted person to be bound over to come up for judgment when called upon, and that power is unaffected by the Act of 1907. THE KING *v.* SPRATLING
C. C. A. 77

4. —— *Larceny—Evidence of Asportavit.*

The prisoner put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting an obstruction. The prosecutor grasped the purse and replaced it :—

Held, that there was sufficient evidence of asportavit to support a charge of larceny. THE KING *v.* TAYLOR - - - - C. C. A. 674

5. —— *Larceny—Fixtures—Agreement for Tenancy of House—Taking Possession with Intention to steal Fixtures—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 31.

A person who procures possession of a house under an agreement between him and the owner for a lease thereof with the fraudulent intention of stealing the fixtures thereto belonging, and upon obtaining possession severs and steals the fixtures, is guilty of larceny under s. 31 of the Larceny Act, 1861.

Rex v. *Munday*, (1799) 2 Leach, C. C. 850, followed. THE KING *v.* RICHARDS
C. C. A. 260

6. —— *Meeting—Lawful Public Meeting—Acting in Disorderly Manner for Purpose of preventing Transaction of Business — Meeting held on Highway—Legality of—Public Meeting Act*, 1908 (8 *Edw.* 7, *c.* 66).

The fact that a public meeting is held upon a highway does not necessarily make the meeting unlawful. Whether it is unlawful or not depends upon the circumstances in which it is held, e.g., whether or not an obstruction is caused. BURDEN *v.* RIGLER - Div. Ct. 337

7. —— *Practice—Conviction on Indictment of one Offence—Admission by Prisoner of another Offence—Request by Prisoner to Court that in passing Sentence both Offences be dealt with—Principles upon which Court should act in deciding whether to comply with Prisoner's Request.*

Where a Court before which a prisoner has been convicted on indictment of an offence is asked by the prisoner to deal with another offence which he admits having committed but for which he has not yet been tried, the Court may properly do so if the other offence is of the same character as the offence of which the prisoner has been found guilty, whether there has been a committal for the other offence or not. If there has been a committal for the other offence, the Court before dealing with it should ascertain that the prosecution consents. If the prosecution does not agree, the Court should not as a matter of course take the other offence into consideration. It may be that the prosecution desires for a sufficient reason that the other charge should be separately investigated.

If there is a committal in another county for an offence of a different character, the Court should not take the other offence into consideration without the consent of the authorities prosecuting the prisoner in respect of it, and even where the prosecution does consent the Court ought still to consider whether in the circumstances it ought to take that course, or whether the public interest requires a separate investigation.

The Court ought not to take another offence into consideration if it is not admitted by the prisoner.

The prisoner was indicted at the Berkshire Assizes on a charge of housebreaking, to which he pleaded guilty. Before sentence was passed he asked the judge to take into consideration a charge of arson which had been brought against him in Hertfordshire and in respect of which he had been committed for trial at the Hertfordshire Assizes, which had not then taken place, and to give him a sentence covering both offences. The judge accordingly took the charge of arson into consideration and passed a sentence of three years' penal servitude, no steps having been taken to ascertain the views of the Hertfordshire police authorities as to the desirability or otherwise of the two charges being dealt with at the same time. Subsequently the prisoner was indicted at the Hertfordshire Assizes before another judge on the charge of arson and pleaded guilty to the indictment. A sentence of five years' penal servitude was passed, it having been stated by the judge that the crime of arson had been very prevalent recently in Hertfordshire, and that the police authorities had therefore been unwilling that the charge of arson should be dealt with by the judge at the Berkshire Assizes at the same time as that of housebreaking. On appeal by the prisoner against the sentence of five years' penal servitude :—

Held, that the sentence ought to be reduced to one of three years' penal servitude to run from the date of the sentence inflicted on the prisoner at the Berkshire Assizes. THE KING *v.* MCLEAN
C. C. A. 332

8. —— *Prosecution — Requisite Consent of Attorney-General not obtained — Jurisdiction—Conviction—No substantial Miscarriage of Justice —Explosive Substances Act*, 1883 (46 & 47 *Vict. c.* 3), *ss.* 2, 7—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

A prisoner was convicted on an indictment charging him with an offence under s. 2 of the Explosive Substances Act, 1883. The consent of the Attorney-General to the preferment of the indictment, which is required by s. 7 of that Act, had not been obtained. The prisoner appealed against the conviction :—

Held, that the consent of the Attorney-General not having been obtained, there was no

CRIMINAL LAW—*continued.*
jurisdiction to try the indictment, and, that being so, the Court of Criminal Appeal had no power to deal with the case under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, as one in which no substantial miscarriage of justice had occurred, and that the conviction must, therefore, be quashed. THE KING *v.* BATES
C. C. A. 964

9. —— *Trial for Murder—Illness of Juryman—Temporary Absence from Court—Custody of Juryman—Rebutting Evidence on behalf of Prosecution—Admissibility.*
The rule that the jury must not separate during a trial for murder does not mean that in no circumstances must they physically part from one another. The rule is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave the rest of his fellows.
On the second day of a trial for murder a juryman became ill and was taken out of Court, but not out of the building, accompanied by two medical men and a Court usher, to a space at the bottom of the building at the back of the Court where there was open air and to which the public had no access. After a consultation between the medical men, one of them returned into Court and gave an opinion as to when the juryman would probably recover. The Court then adjourned for a short time, and the medical man was sworn to take charge of the juryman during the adjournment. He then returned to the juryman, and the two medical men, a constable, and the usher remained with him in the open air for about three-quarters of an hour. The juryman then rejoined his fellows, the usher having been with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury during the adjournment for that night, but was not sworn for the particular purpose of taking charge of the juryman who became ill on the second day. During the whole time the juryman was absent no one spoke to him about the trial. The medical men only spoke to him, and no one else had an opportunity of doing so. On the way to the open air less than a dozen persons had to be passed, and the juryman was in a state of collapse and was in such a condition as to be quite unable to communicate with any one :—
Held, that it was not necessary that the usher who conducted the juror to the open air should be sworn as a Court bailiff to take charge of him upon that occasion, that nothing was done which was not justified in law, and that therefore there was no ground for quashing the conviction.
Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter in the discretion of the judge at the trial.
Semble that where the judge at the trial allows rebutting evidence to be given the Court of Criminal Appeal will not quash a conviction upon the ground that it does not agree with the way in which the judge at the trial exercised his discretion, unless there is something in the rebutting evidence in the nature of a trap, which results in an injustice to the prisoner. THE KING *v.* CRIPPEN - - - C. C. A. 149

—— Larceny by a trick—Goods on sale or return—Power given to pass property in goods—Fraud - - - - 463
See CONTRACT. 1.

—— Witness dangerously ill—Duty of magistrate to take deposition - - 159
See JUSTICES. 1.

CROWN—Grant by charter of revenue fine to corporation — Repeal of grant by Revenue Acts - - - - 1092
See REVENUE. 3.

—— Poor rate—Exemption—Territorial Force—County Association—Officer's quarters
See RATES. 2. 43

—— Practice—Striking out pleadings—Reasonable cause of action — Relief against the Crown — Declaratory judgment—Attorney-General defendant - 410
See PRACTICE.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE AND DAMAGES — Obstruction of view — Public nuisance — Special damage—Pecuniary loss - - 869
See NUISANCE.

DAMAGES—*Contract—Sale of Goods—Act done by Plaintiff in Mitigation of Damages—Profit accruing therefrom to the Plaintiff—Relevancy.*
The W. Company, having contracted to supply certain electric machines to a railway company, delivered machines which failed to satisfy the conditions of the contract as to economy of working. The railway company accepted the machines, reserving their right to damages for the breach of contract, and subsequently, in order to avoid the expense of the continued use of the machines, bought machines of another manufacturer, P., with which they replaced those of the W. Company. If the railway company had continued to use the W. machines, the loss which they would have suffered in consequence of the breach of contract—namely, the amount by which the cost of working the machines supplied during a period of years representing the normal life of a W. machine would have exceeded the cost of working W. machines constructed in accordance with the contract for the same period—would have represented a larger sum than the price paid for the substituted P. machines :—
Held that, as the substitution of the P. machines went in mitigation of the damages consequent on the breach of contract, the railway company were entitled to recover from the W. Company the price paid for the P. machines ; and none the less because the P. machines were so superior to those of the W. Company that it would have been to the pecuniary advantage of

DAMAGES—*continued.*
the railway company to have effected the substitution at their own cost even if the machines supplied had been in accordance with the contract. BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY *v.* UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON - - - - - - **Div. Ct. 575**

DARTMOOR FOREST—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant - - - - - - - - **649**
See COMMON.

DEBENTURES—Company.
See under COMPANY.

—— Stamp—"Marketable security"—Debentures purporting to create charge on ships - - - - - - - - **1078**
See REVENUE. 4.

DECLARATORY JUDGMENT — Striking out pleadings—Reasonable cause of action—Relief against the Crown—Attorney-General defendant - - - - **410**
See PRACTICE.

DEED OF ARRANGEMENT—Registration—Validity—Affidavit sworn before solicitor to the parties—Bankruptcy notice
See BANKRUPTCY. 2. **317**

DEMURRAGE—Charterparty—"Working day" Custom of port—"Surf day" - **264**
See SHIPPING. 1.

DEPENDANT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

—— Workmen's compensation—Fatal accident — Evidence — Inference — Onus of proof - - - - - - - - **1036**
See EMPLOYER AND WORKMAN. 1.

DEPOSIT—Gaming or wagering contract—Stockbroker—Payment of deposit—Repayment of deposit in any event - **296**
See GAMING.

DESERTION—Seaman—Desertion in Australian port—Expense caused by absence due to desertion—Reimbursement - **594**
See SHIPPING. 3.

DEVIATION—Shipping—Contract of affreightment—Bill of lading—Lien for dead freight - - - - - - - - **625**
See SHIPPING. 2.

DISEASE—Workmen's compensation—Cause of death - - - - - - - - **988**
See EMPLOYER AND WORKMAN. 4.

DISTRESS—*Landlord and Tenant—Exemption—Hire-purchase Agreement—Piano let to Wife of Tenant—Goods owned by a Firm—Declaration by Owners—Signature by one Partner—Law of Distress Amendment Act*, 1908 (8 *Edw.* 7, *c.* 53), *ss.* 1, 4.

A piano, which belonged to the plaintiffs, a firm of pianoforte manufacturers, and had been let by them under a hire-purchase agreement to the wife of the tenant of a dwelling-house, was seized by the defendant, a bailiff, under a distress for rent put in by the landlord upon the demised premises. The plaintiffs thereupon served upon the defendant a declaration in writing, in pursuance of the Law of Distress Amendment Act, 1908, s. 1, stating that the piano was the property of the plaintiffs. This declaration, which was not a declaration under the Statutory Declarations Act, 1835, was signed by one member of the plaintiffs' firm with the authority of his partners. The defendant having refused to give up the piano, an action for its detention was brought by the plaintiffs against the defendant:—

Held, that the Law of Distress Amendment Act, 1908, s. 1, does not require a statutory declaration to be made in order to satisfy its terms; that it was not necessary that the declaration should be signed by all the partners in the plaintiffs' firm; and that the piano did not come within the exception created by s. 4, sub-s. 1, of the Act, inasmuch as (1.) the words "made by such tenant" in the sub-section refer not only to the word "settlement," which immediately precedes them, but also to the previous words "bill of sale" and "hire-purchase agreement," and (2.) the piano could not be deemed to have been "in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant" was "the reputed owner thereof."

Shenstone & Co. v. *Freeman*, [1910] 2 K. B. 84, followed. ROGERS, EUNGBLUT & CO. *v.* MARTIN - - - - - - **C. A. 19**

—— Dartmoor Forest—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant
See COMMON. **649**

—— Landlord and tenant—Distress for rent—Charges—Man in possession—Distress for sum not exceeding 20*l.* - - **1103**
See LANDLORD AND TENANT. 2.

DISTRESS FOR RENT RULES, 1888, rr. 15, 16, Appendix II., Scale II. - - **1103**
See LANDLORD AND TENANT. 2.

DIVIDED PARISHES AND POOR LAW—Settlement by residence—Irremovability **748**
See POOR LAW.

DOCKYARD PORTS REGULATION ACT, 1875
See HARBOUR. **171**

DOMICIL — New Zealand bankruptcy — Personalty in England — Subsequent English bankruptcy—Title of official assignee in New Zealand—Priorities
See BANKRUPTCY. 3. **896**

DURESS—Promissory note—Signature procured by duress—Burden of proof - - **854**
See NEGOTIABLE INSTRUMENT.

EDUCATION.
See under SCHOOLS.

ELEMENTARY EDUCATION.
See under SCHOOLS.

EMPLOYER AND WORKMAN—*Compensation—Accident arising out of and in the Course of the Employment—Fatal Accident—Dependants—Evidence—Inference—Onus of Proof—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Per Cozens-Hardy M.R.: In considering what is sufficient evidence in a fatal accident to justify an inference that the accident has arisen "out of and in the course of the employment" a distinction must be drawn between cases where death occurs at a time when the workman is engaged in his employer's work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases on his own account.

Per Fletcher Moulton L.J.: Where the workman is engaged in his employer's work up to the time of his death, and the last acts known about him are consistent with the continuance of that work, the onus is on those who allege a cessation of his work for his employer, to prove it.

A brakesman in charge of a train that was running buffer to buffer with and pushing another train towards some siding points endeavoured to climb from the truck in which he was riding on to the brake van of the first train, and in so doing fell and was killed. The points would have had to be operated by one of the brakesmen:—

Held (Buckley L.J. dissenting), that there was evidence from which the Court could infer that the accident arose "out of and in the course of the employment" and that the dependants were entitled to compensation. ASTLEY *v.* R. EVANS & Co. - - - - **C. A. 1036**

2. —— *Compensation — Bicycle Accident — Collector—Accident arising out of and in the Course of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A collector and canvasser to an industrial company, whilst riding a bicycle in the course of his employment, was knocked down and killed by a tramcar. The fact that he used a bicycle for the purposes of his employment was known to and not forbidden by the company:—

Held, that the accident arose out of the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

McNeice v. *Singer Sewing Machine Co., Ld.*, 1911 S. C. 12, followed.

Warner v. *Couchman*, [1911] 1 K. B. 351, distinguished. PIERCE *v.* PROVIDENT CLOTHING AND SUPPLY COMPANY - - - **C. A. 997**

3. —— *Compensation — Contracting-out Scheme of Compensation—Employer's Liability—Jurisdiction of County Court Judge—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 3, *sub-s.* 1.

A workman who has agreed to accept a scheme of compensation certified by the Registrar of Friendly Societies as fulfilling the conditions imposed by s. 3 of the Workmen's Compensation Act, 1906, is outside the provisions of the Act altogether, and therefore the question of the employer's liability is to be determined solely by the scheme. HORN *v.* LORDS COMMISSIONERS OF THE ADMIRALTY **C. A. 24**

4. —— *Compensation — Cause of Death — Accident arising out of Employment—Disease—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An elderly man employed as a timberman at a colliery was engaged on the morning shift in helping to push empty trucks up an incline and tumble them off the rails to allow full trucks to pass. He then set to work to cut a timber prop into shape. Ten minutes later he complained of being in pain, and he died in the evening of the same day of angina pectoris. The widow applied under the Workmen's Compensation Act, 1906, for compensation against the colliery owners. The medical evidence shewed that the man's heart was in a diseased condition, which might have been of long standing, that in the case of a man of his age a fatal attack might have been brought on by any slight exertion, and that the symptoms of the attack did not always appear immediately. The county court judge found that the death was caused by over-exertion in tumbling the trucks and made an award in favour of the applicant:—

Held, that there was no evidence to justify the finding of the county court judge. HAWKINS *v.* POWELLS TILLERY STEAM COAL COMPANY **C. A. 988**

5. —— *Compensation—Dependant—Partial Dependency—Basis of Assessment—Earnings—Deduction of Cost of Maintenance—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*) (ii.).

Upon an application under the Workmen's Compensation Act, 1906, by the father of a boy who died from the effects of an accident arising out of and in the course of his employment at the respondents' colliery, it appeared that the boy, who lived at his father's house, assisted his father in his trade of a barber, and that these services had some money value to the father. The county court judge found that the wages earned by the boy at the colliery were not more than sufficient for the cost of his keep, and that he earned nothing else, and he therefore held that the father was not a partial dependant:—

Held (Farwell L.J. dissenting), that the Court was bound by *Osmond* v. *Campbell & Harrison, Ld.*, [1905] 2 K. B. 852, to hold that in cases of dependency, whether total or partial, the sum which it would have cost to maintain the deceased workman ought not to be taken into account, and that the case must go back to the county court judge to award such sum as he should consider reasonable and proportionate to the injury of the applicant.

Per Farwell L.J., and, *semble*, *per* Cozens-Hardy M.R. (Fletcher Moulton L.J. dissenting): The value of the boy's services to the father, not being earnings within the meaning of the Act, was properly excluded from consideration. HALL *v.* TAMWORTH COLLIERY COMPANY, LIMITED **C. A. 341**

EMPLOYER AND WORKMAN—*continued.*

6. —— *Compensation* — "*Dependants*" — *Death of Workman — Widow — Dependency — Total or partial—Legal Liability to support—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13, "*Dependants*," *First Schedule* (1.) (*a*) (i.) *and* (ii.)

Hodgson v. *West Stanley Colliery*, [1910] A. C. 229, in no way impeaches or affects *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869, and *Williams* v. *Ocean Coal Co.*, [1907] 2 K. B. 422, as to the implied dependency of the wife on her husband, even when separated from him and not actually dependent upon his earnings.

Per Fletcher Moulton L.J.: Where there is a clear legal liability to support—even though that liability at the moment was being evaded—persons having a legal right to maintenance will not be deprived of their compensation as dependants merely because they were not at the time in fact sharing the earnings of the injured workman. Meaning of "dependants" considered. KEELING *v.* NEW MONCKTON COLLIERIES, LIMITED - - - - **C. A. 250**

7. —— *Compensation — Frost-bite — Normal Risk—Accident arising out of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A journeyman baker, whose right hand and arm had been injured by frost-bite while out on his rounds with his employer's cart on a cold day, claimed compensation for this injury as "an accident arising out of" his employment:—

Held (Fletcher Moulton L.J. dissenting), that, even assuming that there had been "an accident," there was no peculiar danger to which the applicant had been exposed beyond that which other drivers of vehicles or persons engaged in outdoor work on that day had experienced, and consequently that the accident had not arisen "out of" the employment.

Per Fletcher Moulton L.J.: When a workman sustains a physiological injury as the direct result of the work he is engaged upon and in the reasonable performance of his duties, he meets with "an injury by accident" within the meaning of the Act. If the employment brings with it greater exposure either to heat or cold, and injury results, that injury arises "out of" the employment. WARNER *v.* COUCHMAN **C. A. 351**

8. —— *Compensation* — "*Incapacity for Work*" — *Disfigurement — Loss of Earning Capacity—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I.* (1.) (*b*), (3.).

A workman, who had lost the sight of his left eye twelve years previously, met with an accident which necessitated the removal of his left eyeball: on his recovery from the operation he was unable to obtain work in consequence of his being manifestly a one-eyed man, though his capacity for work was exactly what it was before the accident:—

Held (Fletcher Moulton L.J. dissenting), that an injury which did not cause an incapacity for work, but only made patent to every one a pre-existing incapacity, did not entitle the workman to compensation.

Per Fletcher Moulton L.J.: "Incapacity for work" in Sched. I. (1.) (*b*) is not to be restricted to loss of physical power for doing work. It includes a case where the workman has by the accident lost the power of doing the work as a workman for wages; a workman therefore has brought himself within the Act when he shews that by reason of an accident arising out of and in the course of the employment he has sustained an injury which lessens his earning capacity, and this whether or not it has diminished his physical capacity for doing work. BALL *v.* WILLIAM HUNT & SONS, LIMITED - **C. A. 1048**

9. —— *Compensation — Negligence of Employer and also of Third Party—Accident to Workman—Compensation recovered by Workman—Action for Indemnity by Employer against Third Party — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

Where an accident, in respect of which an employer has been compelled under the Workmen's Compensation Act, 1906, to pay compensation, was caused by the combined negligence of another person and of his own servants, the employer cannot maintain an action for indemnity against that other person under s. 6 of the Act.

A steamer belonging to the plaintiffs was approaching a staith, which was being used by and under the control of the defendants, for the purpose of taking a cargo of coal there from the defendants. Two workmen employed by the plaintiffs were in attendance on the steamer in a boat for the purpose of taking a rope from the steamer to the staith. In consequence of the plaintiffs' servants in charge of the steamer complying with a direction given by the staithmaster employed by the defendants, the propeller was set in motion, with the result that the boat was upset, one of the workmen being drowned and the other injured. The plaintiffs, having been compelled to pay compensation in respect of the accident under the Workmen's Compensation Act, 1906, brought an action against the defendants for indemnity under s. 6 of the Act. A commissioner of assize by whom the action was tried found that both the staithmaster and those in charge of the ship had been negligent, the former in giving the direction that he did, and the latter in complying with it, without ascertaining whether it was safe to do so, and that their combined negligence had caused the accident; and upon these findings he held that the plaintiffs, through their servants, having been guilty of negligence which contributed to the accident, could not maintain the action:—

Held, that the judgment of the learned commissioner was correct.

Question considered, whether it was the proper inference from the facts proved in evidence that negligence on the part of the staith-master was an effective cause of the accident. CORY & SON, LIMITED *v.* FRANCE, FENWICK & CO., LIMITED **C. A. 114**

EMPLOYER AND WORKMAN—*continued.*

10. —— *Compensation — Notice—Reasonable Cause for not giving Notice—Mistake—Ignorance of Existence of Act—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

Ignorance on the part of a workman of the existence of the Workmen's Compensation Act, 1906, and of any right to compensation for an accident arising out of his employment, is not a "mistake" nor "a reasonable cause" for not giving notice of an accident within the meaning of s. 2 of the Act. ROLES *v.* PASCALL & SONS **C. A. 982**

11. —— *Compensation—Recorded Agreement—Review—Reduction of Weekly Payment as from antecedent Date — Over-payment—Default in respect of reduced Payments—Leave to issue Execution—Plea of Payment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 19; *Sched. II., par.* 9.

Where under the Workmen's Compensation Act, 1906, an application is made to reduce as from a definite antecedent date a weekly payment of compensation under a recorded agreement, and a reduction is ordered as from that date, the amount overpaid under the agreement between the date from which the reduction is to take effect and the date of the order cannot be treated as a payment in advance pro tanto of the subsequent reduced weekly payments.

But *semble* the amount overpaid may be recovered from the workman by action. HOSEGOOD & SONS *v.* WILSON - - - **C. A. 30**

12. —— *Compensation—Review — Reduction of Weekly Payments — Earning Capacity of Workman—Failure to obtain Work—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 3, 16.

Where, upon an application by employers for a reduction of the compensation awarded to a driver in their employ on the footing of total incapacity, it was proved (1.) that the workman, though unable to resume his occupation of driver, was able to do any form of light work, (2.) that he had applied for various forms of light work without success:—

Held (Cozens-Hardy M.R. dissenting), that it was competent to the county court judge to find that the circumstances had so altered as to justify a reduction.

Clark v. *Gas Light and Coke Co.*, (1905) 7 W. C. C. 119, and *Proctor & Sons* v. *Robinson*, [1911] 1 K. B. 1004, explained and distinguished.

Per Buckley, L.J.: Inability to earn, for the purposes of Sched. I., par. 3, of the Workmen's Compensation Act, 1906, is inability to get employment owing to some incapacity for work (see Sched. I., par. 1 (*b*)) personal to the workman, to the exclusion of inability to get employment owing to the state of the labour market, and this construction applies to an application to review as well as to an original application for compensation. Consequently, proof that a workman has made repeated and unsuccessful efforts to obtain suitable employment does not of itself establish a right to compensation on the basis of total incapacity. CARDIFF CORPORATION *v.* HALL - - - - - **C. A. 1009**

EMPLOYER AND WORKMAN—*continued.*

13. —— *Compensation — Review—Reduction of Weekly Payments — Earning Capacity of Workman—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

Where, upon an application by employers to reduce the weekly compensation payable to a workman under the Workmen's Compensation Act, 1906, on the footing of total incapacity, it was proved that the man was prevented by the accident from doing the full work of an ordinary labourer, but that he could do some light work if he could obtain it, and there was no evidence that he could obtain any suitable employment:—

Held, that it was incumbent on the employers to shew what particular light work the workman could do and to give some evidence that he had a chance of obtaining that particular kind of work, and that in the absence of that evidence reduction ought to be refused. PROCTOR & SONS *v.* ROBINSON - - - **C. A. 1004**

14. —— *Compensation—Shipping—Amount—Seaman—Member of Royal Naval Reserve—Concurrent Contracts of Service—Amount of Compensation — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9, *sub-s.* 1; *Sched. I., par.* 2 (*b*).

Sect. 9, sub-s. 1, of the Workmen's Compensation Act, 1906, which excludes from the operation of the Act persons in the naval and military service of the Crown, deals solely with the rights under the contract of service with the Crown, and in no way affects the rights of any such person under a contract of service with a private employer, and, although the Crown cannot be made liable under the Act, the contract with the Crown is a contract of service within par. 2 (*b*) of Sched. I., which deals with concurrent contracts of service; consequently, in estimating the amount of compensation payable in respect of an accident arising out of and in the course of the private employment, regard must be had to the earnings of the injured man in the service of the Crown:—

So *held* by the Court of Appeal (Farwell L.J. dissenting).

Therefore, where a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve, and as such entitled to a retainer of 6*l.* a year, met with an accident within the purview of the Act while employed on the merchant ship, and was thereby disabled from continuing to serve in the Royal Naval Reserve:—

Held (Farwell L.J. dissenting), that in estimating the amount of compensation payable to him by the shipowner the retainer ought to be taken into account as being earnings under a concurrent contract of service.

Per Cozens-Hardy M.R.: Having regard to the regulations applicable to Royal Naval Reserve stokers the retainer was incidental to the man's employment on the merchant ship. BRANDY *v.* OWNERS OF S.S. RAPHAEL - - **C. A. 376**

15. —— *Compensation—Shipping—Seaman—Accident arising out of and in Course of Employment—Return to Ship—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

In the first of these cases under the Work-

EMPLOYER AND WORKMAN—*continued.*

men's Compensation Act, 1906, a sailor, having been on shore with leave, while returning to the ship fell into the water and was drowned. The access to the ship from the quay was by a gangway which was properly lighted. There was no evidence whether he had or had not reached the gangway when he fell :—

Held, that it was not proved that the accident arose out of his employment and that the owners were not liable.

In the second case the sailor had also been on shore with leave and was returning ; there was another ship lying between the quay and his own ship, and to get to the latter he had to cross a gangway between the two ships ; he reached the gangway, and while crossing fell from it and was drowned :—

Held, that the accident arose in the course of his employment and that the owners were liable.

Moore v. *Manchester Liners, Ld.*, [1909] 1 K. B. 417 ; [1910] A. C. 498, discussed and explained. KITCHENHAM *v.* OWNERS OF S.S. JOHANNESBURG. LEACH *v.* OAKLEY STREET & CO. - - - - - - - **C. A. 523**

16. —— *Compensation—Termination of Employment—Application for Wages for past Work—Accident arising out of and in the Course of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The applicant, who was employed at the respondents' mill, was discharged on a Wednesday. By the usage of the mill the wages were made up to Wednesday and were payable at the mill on Friday. The applicant went to the mill on the Friday for her wages, which were paid her, and, on going down the stairs of the mill, slipped and was injured :—

Held (Buckley L.J. dissenting), that the accident arose out of and in the course of her employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906. RILEY *v.* WILLIAM HOLLAND & SONS, LIMITED **C. A. 1029**

17. —— *Compensation—"Workman"—"Remuneration"—Remuneration exceeding* 250*l. a year—Purser—Bonus—Perquisites—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

"Remuneration" in s. 13 of the Workmen's Compensation Act, 1906, which excepts from the definition of "workman" any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year, is synonymous with "earnings" as used in the Act.

So *held* by the Court of Appeal (Fletcher Moulton L.J. dissenting).

A claim for compensation by the widow of the purser of a ship which was lost with all hands was resisted on the ground that the purser's remuneration exceeded 250*l.* a year. In addition to his regular wages, at the end of each voyage, whenever everything was reported to be satisfactory, the purser received, at a fixed rate per month, a bonus or extra wages. He also made a profit by the sale on board ship of whisky in nips. He was debited with so much per bottle, and nips were sold at a fixed price which produced a larger sum per bottle than the sum debited. This balance was kept by the purser with the knowledge and consent of the respondents :—

Held (Fletcher Moulton L.J. dissenting), that both the bonus and the profit on the whisky ought to be taken into account in estimating the purser's remuneration. SKAILES *v.* BLUE ANCHOR LINE, LIMITED - - - **C. A. 360**

EQUITABLE JURISDICTION.
See under JURISDICTION.

ESTOPPEL—Signature to document obtained by fraud—Guarantee—Defence of non est factum—Negligence—Proximate cause of loss - - - - - - **489**
See CONTRACT. 2.

EVIDENCE—Asportavit—Larceny - - **674**
See CRIMINAL LAW. 4.

—— Criminal law.
See under CRIMINAL LAW.

—— Workmen's compensation—Fatal accident—Inference—Onus of proof- - **1036**
See EMPLOYER AND WORKMAN. 1.

EXECUTION—"Costs of execution"—Sheriff's costs of interpleader - - - **104**
See BANKRUPTCY. 6.

—— Judgment debtor—Interpleader—Sale by sheriff—Costs of execution - - **641**
See BANKRUPTCY. 5.

—— Leave to trustee in bankruptcy to issue execution—Garnishee order - - **317**
See BANKRUPTCY. 2.

—— Workmen's compensation — Over-payment—Leave to issue execution—Plea of payment - - - - - **30**
See EMPLOYER AND WORKMAN. 11.

EXCISE.
See under REVENUE.

EXPLOSIVE SUBSTANCES — Criminal law — Prosecution — Requisite consent of Attorney-General not obtained—Jurisdiction—Conviction - - - **964**
See CRIMINAL LAW. 8.

FACTORY—*Employment of Children—Cleaning Machinery—Removing By-product—Spinning Machine—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 13.

By s. 13 of the Factory and Workshop Act, 1901, it is enacted that a child must not be allowed to clean in any factory any part of any machinery whilst the machinery is in motion by the aid of steam, water, or other mechanical power.

A child of twelve years was employed in removing, partly by hand and partly by means of a stick, from the rollers and top board of a cap-spinning machine for spinning woollen yarn, certain fluff formed in the course of spinning. If

FACTORY—*continued.*
this fluff were not removed the rollers would become choked and the process would stop. The fluff was not mere refuse, but had a saleable value and was in fact sold :—
Held, that the child was cleaning machinery within the meaning of the enactment. TAYLOR *v.* MARK DAWSON & SON, LIMITED **Div. Ct. 145**

2. —— *Fencing of Machinery—Hoist not connected with Mechanical Power—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10.
Sect. 10 of the Factory and Workshop Act, 1901, which enacts, with respect to the fencing of machinery in a factory, that "every hoist or teagle and every fly-wheel directly connected with the steam or water or other mechanical power" must be securely fenced, applies to a hoist which is not connected with mechanical power. JACKSON *v.* A. G. MULLINER MOTOR BODY COMPANY, LIMITED - - - **Div. Ct. 546**

FATAL ACCIDENT—Workmen's compensation—Dependants—Evidence—Inference—Onus of proof - - - - **1036**
See EMPLOYER AND WORKMAN. 1.

FENCE—Dartmoor Forest—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant—Distress - - **649**
See COMMON.

FENCING—Factory—Fencing of machinery—Hoist not connected with mechanical power - - - - - - **546**
See FACTORY. 2.

FINE—Grant by charter of revenue fine to corporation—Repeal of grant by Revenue Acts—Crown - - - **1092**
See REVENUE. 3

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FIRE—London building—Means of escape in case of fire—Public-house - - **235**
See LONDON. 1.

FIXTURES—Larceny—Agreement for tenancy of house—Taking possession with intention to steal fixtures - - - **260**
See CRIMINAL LAW. 5

FOREST—Dartmoor Forest—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant—Distress - - - - **649**
See COMMON.

FORFEITURE — Company — Unpaid calls—Notice to forfeit shares—Interim injunction restraining forfeiture - **455**
See COMPANY. 1.

—— Relief—Costs—Breach by underlessee **35**
See LANDLORD AND TENANT. 5.

FRANCHISE.
See under PARLIAMENT.

FRAUD—Formation of company—Fraudulent promoter—Bankruptcy of promoter—Proof - - - - - - - **95**
See BANKRUPTCY. 4.

—— Guarantee—Defence of non est factum—Negligence—Estoppel—Proximate cause of loss - - - - - - **489**
See CONTRACT. 2.

—— Sale of goods—Voidable contract—Pledge by purchaser - - - - - **463**
See CONTRACT. 1.

FRAUDS, STATUTE OF—Contract not to be performed within a year—Writing signed by party to be charged - - **425**
See SALE OF GOODS. 2.

FROST-BITE—Normal risk—Workmen's compensation - - - - - **351**
See EMPLOYER AND WORKMAN. 7.

GAME—*Licence to deal in—Sale of live Pheasants bred on Pheasant Farm—Whether Licence necessary—Game Act*, 1831 (1 *& 2 Will.* 4, *c.* 32), *ss.* 4, 27.
Pheasants are not the less "game" within the meaning of s. 27 of the Game Act, 1831, because they are live tame birds which have been reared in confinement under barndoor hens and have never at any time been at liberty.
Harnett v. *Miles*, (1884) 48 J. P. 455, followed. COOK *v.* TREVENER - - - - **Div. Ct. 9**

GAMING—*Gaming or Wagering Contract—Stockbroker—Payment of Deposit—Profit on Rise in certain Stocks—Repayment of Deposit in any Event — Gaming Act*, 1845 (8 *& 9 Vict. c.* 109), *s.* 18.
The defendant, who was a dealer in stocks and shares, issued a circular which stated that upon payment of a subscription of 5*l.* or some multiple thereof the subscriber would be entered in the defendant's three months' trust in respect of a certain number of shares in three named stocks, and the subscriber would then be entitled to the profit arising from the difference between the prices of the stocks on the opening day of the trust and the prices at the end of ninety days from that date, less 10 per cent., together with repayment of the subscription; and in the event of there being no such profit the subscriber would be entitled to the return of his subscription. The plaintiff paid to the defendant a subscription of 20*l.* upon the terms of the circular, and at the end of the ninety days there accrued a profit upon the prices of the stocks. The plaintiff also paid to the defendant a subscription of 20*l.* in respect of a similar trust, which resulted in a loss. The defendant repaid to the plaintiff the amount of his subscription in respect of the first-named trust. In an action to recover the amount of the profit less 10 per cent. in respect of the first-named trust and the 20*l.* subscription in respect of the second trust :—
Held, that, though the subscriber was, under the terms of the circular, in any event not to lose his subscription, yet, inasmuch as he would lose interest upon the amount of the subscrip-

GAMING—*continued.*
tion, there was a sufficient loss to make the contracts gaming or wagering contracts within s. 18 of the Gaming Act, 1845, and that the plaintiff was not entitled to recover.
The definition of gaming and wagering by Cotton L.J. in *Thacker* v. *Hardy*, (1878) 4 Q. B. D. 685, at p. 695, considered. RICHARDS *v.* STARCK - - - - - **Channell J. 296**

GARNISHEE ORDER—Leave to trustee in bankruptcy to issue execution - **317**
See BANKRUPTCY. 2.

GOODS—Sale of.
See under SALE OF GOODS.

GRANT—Corporation, Grant by charter of revenue fine to—Repeal of grant by Revenue Acts—Crown - - - **1092**
See REVENUE. 3.

GREAT WESTERN RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891 - 386
See RAILWAY. 1.

GUARANTEE—Defence of non est factum—Negligence — Estoppel — Proximate cause of loss - - - - - **489**
See CONTRACT. 2.

HARBOUR—*Rights of Navigation—Right of Shipowner to moor Coal Hulk in Navigable Harbour to supply Steamships with Coal—Trespass—Dockyard Ports Regulation Act*, 1865 (28 & 29 *Vict. c.* 125).
The right of the public to the use of the waters of a navigable harbour is limited to user for the purposes of navigation and fishery and matters incidental thereto, and any right of navigation claimed over such waters must be a right incidental to the navigation of the person claiming it, and not a right incidental to the navigation of others.
A claim by colliery owners of a right as members of the public to moor in a public harbour a coal hulk for the purpose of supplying coals therefrom to merchant vessels entering the harbour is a claim of a right not incidental to navigation and is bad in law.
Rex v. *Russell*, (1827) 6 B. & C. 566, discussed and disapproved. DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. ANSON - **C. A. 171**

HIGHWAY—*Extraordinary Traffic—Excessive Weight—Average Expense of repairing Highways in the Neighbourhood — Extraordinary Expenses—Damage recoverable—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.
The amount which can be recovered under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, is the expense caused by the damage arising from the extraordinary traffic or excessive weight upon the highway, provided the damage has been such as to cause extraordinary expense, and in order that the expense may be extraordinary within the meaning

HIGHWAY—*continued.*
of the section the highway rate of the district must be substantially increased by the damage so as to place an unfair burden on the ratepayers.
The expression "highways in the neighbourhood" in the section means similar roads in a neighbourhood of a similar character to that in which the road upon which the extraordinary traffic is conducted is situated. BILLERICAY RURAL COUNCIL *v.* POPLAR UNION AND KEELING - - - - **Channell J. 734**

—— Meeting held on highway—Legality of—Lawful public meeting - - **337**
See CRIMINAL LAW. 6.

HIRE-PURCHASE AGREEMENT — Distress — Exemption—Piano let to wife of tenant - - - - - - **19**
See DISTRESS.

HOTEL—Undisclosed principal—Manager of hotel—Licence in name of manager—Unauthorized purchase by manager—Liability of owners - - - **459**
See PRINCIPAL AND AGENT.

HOUSE OF LORDS—Criminal Law (Appeal)—Practice—Printing papers - - **461**
See CRIMINAL LAW. 1.

IGNORANCE—Workmen's Compensation Act—Notice—Mistake—Ignorance of existence of Act - - - - - **982**
See EMPLOYER AND WORKMAN. 10.

IMPROVEMENTS—Market garden—Compensation for improvements—Agricultural holdings - - - - - **797**
See LANDLORD AND TENANT. 1.

INCEST—Evidence to prove previous relations—Admissibility—Punishment of incest
See CRIMINAL LAW. 1. **461**

INDEMNITY — Workmen's compensation — Action for indemnity by employer against third party - - - **114**
See EMPLOYER AND WORKMAN. 9.

INFANT—*Apprenticeship Deed—Covenant not to practise within certain Area after Cessation of Apprenticeship — Breach of Covenant — Injunction.*
The rule that an action will not lie to enforce a covenant entered into by an infant in an apprenticeship deed applies only to covenants which it is sought to enforce during the currency of the apprenticeship. A covenant to do or abstain from doing something after the apprenticeship shall have ceased may, provided that the deed as a whole was for the apprentice's benefit, be enforced against him by action.
By a deed of apprenticeship the defendant, an infant, bound himself apprentice to the plaintiff in his business as an architect and surveyor for the term of four years. The deed contained a covenant by the defendant not to carry on within ten years after the expiration of the term the business of an architect or surveyor within ten miles of the town where

INFANT—*continued.*
the master resided. There was evidence that no architect in the town would accept as an apprentice a person who refused to enter into a similar restrictive covenant :—
Held, (1.) that, having regard to the impossibility of the defendant obtaining instruction except upon the terms of his entering into the covenant, the covenant was reasonable; (2.) that as it did not come into operation until after the termination of the apprenticeship it was enforceable against the defendant by injunction. GADD *v.* THOMPSON **Div. Ct. 304**

—— Factory—Cleaning machinery—Removing by-product—Spinning machine - **145**
See FACTORY. 1.

INJUNCTION—Company—Unpaid calls—Notice to forfeit shares—Interim injunction restraining forfeiture - - - **455**
See COMPANY. 1.

—— Copyright.
See under COPYRIGHT.

—— Infant—Apprenticeship deed—Breach of covenant - - - - - **304**
See INFANT.

INLAND REVENUE.
See under REVENUE.

INSURANCE (BURGLARY)—*Policy—Theft—Exception of Theft by Member of Business Staff—Accessory before the Fact—Principal in the Second Degree.*
A Lloyd's policy of insurance against loss by theft contained a proviso excepting loss by theft by members of the assured's business staff.
A porter on the business staff of the assured, in pursuance of a preconceived scheme, admitted a member of a gang of thieves into the business premises to enable him to commit a theft therein. The theft was committed in the porter's absence :—
Held, that the case fell within the proviso and that the underwriters were not liable; by Walton J., because the porter, being an accessory before the fact, was by virtue of the Accessories and Abettors Act, 1861, guilty of theft; by the Court of Appeal, because he was a principal. SAQUI & LAWRENCE *v.* STEARNS - **C. A. 426**

INSURANCE (MARINE)—*Reinsurance—"Open Cover"—Loss—Refusal to sign Policy—New Contract for Good Consideration—Contract for Sea Insurance not expressed in a Policy—Payment of Loss—Penalty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 93, 97—*Stamp Objection—Costs.*
The plaintiffs, an insurance company, by means of an "open cover" extending over a period of more than twelve months, reinsured with the defendant, an underwriter at Lloyd's, the risks which they had insured with respect to cargo to be carried in certain steamers during the period in question. The defendant having refused to sign the policy put forward by the plaintiffs in respect of a loss, for which they had become liable in the sum of 230*l.* under their

INSURANCE (MARINE)—*continued.*
original insurance, on the ground that the plaintiffs had not made to the defendant all the declarations that they should have made under the "open cover," it was verbally agreed that an independent person should be appointed to examine the plaintiffs' books, and that, if he certified that all the declarations had been made, the defendant would sign the policy in question and would pay the 230*l.* for the loss. The person appointed, after examining the plaintiffs' books, certified that all the declarations had been made, but the defendant refused to sign the policy and did not pay the 230*l.* In an action to recover 230*l.* as damages for a breach of the verbal agreement :—
Held, that the action was not maintainable, (1.) because if the defendant paid the 230*l.* he would be paying a sum of money upon a loss relative to sea insurance, which insurance was not expressed in a policy of sea insurance duly stamped, and the defendant would, therefore, be liable to a penalty under s. 97 of the Stamp Act, 1891; and (2.) because the verbal agreement was a contract for sea insurance, and, not being expressed in a policy of sea insurance, was invalid under s. 93 of the Stamp Act, 1891.
Hyams v. *Stuart King*, [1908] 2 K. B. 696, distinguished.
Held, also, that in the circumstances the defendant was not entitled to an order for the payment by the plaintiffs of the defendant's costs of the action. GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) *v.* DA COSTA **Hamilton J. 137**

INTEREST—Mandamus—Sufficiency of interest of prosecutor - - - - **560**
See MANDAMUS.

INTERPLEADER—Sheriff's costs of interpleader—"Costs of execution"—Execution creditor's costs - - - **104**
See BANKRUPTCY. 6.

JUDICATURE (PROCEDURE) ACT, 1894—Bankruptcy—Appeal—Practice—Order extending time for appealing - **841**
See BANKRUPTCY. 1.

JURISDICTION—County court—Equitable jurisdiction—Cancelling agreement for lease—"Value of the property" **666**
See LANDLORD AND TENANT. 3.

—— Criminal appeal.
See under CRIMINAL LAW.

—— Railway Commission.
See under RAILWAY.

—— Solicitor—Undertaking to pay money to person not client—No misconduct on part of solicitor, nor legal proceedings pending—Disciplinary jurisdiction of Court - - - - - **840**
See SOLICITOR. 5.

—— Summary—Justices.
See under JUSTICES.

JURISDICTION—*continued.*

—— Summons—Absence of seal—Defect in form—Summary jurisdiction - **880**
See JUSTICES. 3.

—— Workmen's compensation—Jurisdiction of county court judge - - - - **24**
See EMPLOYER AND WORKMAN. 3.

JURYMAN—Illness of—Temporary absence from Court—Custody of juryman - **149**
See CRIMINAL LAW. 9.

JUSTICES — *Indictable Offence — Evidence—Witness dangerously ill—Duty of Magistrate to take Deposition—Justice of the Peace—Indictable Offences Act*, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 17—*Criminal Law Amendment Act*, 1867 (30 *&* 31 *Vict. c.* 35), *s.* 6.

It is the duty of the justice of the peace before whom a person appears charged with any indictable offence to take in the presence of the accused the depositions of all those who know the facts and circumstances of the case, wherever such a course is practicable. This duty obliges the justice of the peace, where it is practicable, to go to the residence of a witness who is dangerously ill and there take his deposition.

Whether it is or is not practicable in any particular case to take the deposition of a witness at the residence of the witness is a question for the justice of the peace to decide in the exercise of his judicial discretion, and in deciding that question he may take into account the fact that the taking of a deposition will in the particular case interfere with the business of his Court. THE KING *v.* BROS. *Ex parte* HARDY **Div. Ct. 159**

2. —— *Summary Jurisdiction—Consent of Defendant to be tried summarily—Evidence given by Defendant and his Witnesses—Subsequent Committal—Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 12, 24, 27—*No Statutory Caution—Indictable Offences Act*, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 18—*Indictment at Quarter Sessions—True Bill—Jurisdiction of Quarter Sessions to try.*

The power of a Court of summary jurisdiction under s. 12 of the Summary Jurisdiction Act, 1879, to commit a person charged for trial may be exercised at any stage of the proceedings up to adjudication, notwithstanding that at an earlier stage the defendant has consented to the case being dealt with summarily and the hearing has proceeded on that basis to the close of the evidence for the defence.

A defendant charged with larceny before a Court of summary jurisdiction, having consented to the case being dealt with summarily, gave evidence, without being cautioned as required by s. 18 of the Indictable Offences Act, 1848, and called witnesses. At the close of the evidence, the justices were of opinion that it was not expedient to deal summarily with the case, and committed the defendant without his consent for trial at quarter sessions, where an indictment was preferred on which the grand jury returned a true bill. The Court of quarter sessions, on account of what had taken place before the

JUSTICES—*continued.*

Court of summary jurisdiction, declined to proceed with the trial of the indictment :—

Held, that the jurisdiction of quarter sessions to try the indictment was not ousted by any irregularity in the proceedings before the Court of summary jurisdiction. THE KING *v.* HERTFORDSHIRE JUSTICES - - **Div. Ct. 612**

3. —— *Summons—Absence of Seal—Defect in Form—Justice of the Peace—Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 1—*Summary Jurisdiction Rules*, 1886, *r.* 31.

By s. 1 of the Summary Jurisdiction Act, 1848, it is provided that no objection shall be taken or allowed to any summons for any alleged defect therein in substance or in form.

Rule 31 of the Summary Jurisdiction Rules, 1886, provides that the forms in the schedule thereto, or forms to the like effect, may be used, with such variations as circumstances may require. The form of a summons given in the schedule indicates a place for a seal by the letters L. S., but gives no more specific direction in the matter.

An information having been laid before a justice of the peace charging a person with an offence punishable under the Summary Jurisdiction Acts, the justice issued an instrument which bore no seal but was in all other respects sufficient as a summons. This instrument was served upon the person charged, who appeared before the justices at the time and place specified therein and objected to the jurisdiction of the Court on the ground that he had not been duly summoned. The justices overruled the objection and convicted the person charged.

A rule nisi having been obtained to quash the conviction :—

Held, that if the absence of the seal was a defect, it was a defect in form within the meaning of s. 1 of the Summary Jurisdiction Act, 1848, and that the conviction was good. THE KING *v.* GARRETT-PEGGE. *Ex parte* BROWN - - - - - - **Div. Ct. 880**

—— Betting.
See under BETTING.

—— Building—Notice to set back—Forecourt or other space - - - - - **740**
See LONDON. 2.

—— Carriage—Licence.
See under REVENUE.

—— Cinematograph—Licence.
See under CINEMATOGRAPH.

—— Company—List of members—Default in sending to Registrar — No annual general meeting - - - - - **588**
See COMPANY. 3.

—— Criminal law.
See under CRIMINAL LAW.

—— Distress for rent—Charges—Man in possession - - - - - - - **1103**
See LANDLORD AND TENANT. 2.

—— Factory—Employment of children - **145**
See FACTORY. 1.

JUSTICES—*continued.*

—— Factory—Fencing of machinery—Hoist not connected with mechanical power **546**
See FACTORY. 2.

—— Game—Licence to deal in—Sale of live pheasants bred on pheasant farm—Whether licence necessary - - **9**
See GAME.

—— Larceny—Evidence of asportavit - **674**
See CRIMINAL LAW. 4.

—— London Building Acts—Means of escape in case of fire—Public-house - **235**
See LONDON. 1.

—— Lunatic (Pauper)—Expenses of maintenance—Reasonable charges—Order of justices - - - - - - **437**
See LUNACY.

—— Margarine.
See under MARGARINE.

—— Merchandise marks.
See under MERCHANDISE MARKS.

—— Money-lender.
See under MONEY-LENDER.

—— Motor car.
See under MOTOR CAR.

—— Poor rate.
See under RATES.

—— Rates.
See under RATES.

—— Schools.
See under SCHOOLS.

—— Shipping.
See under SHIPPING.

—— Street (New)—Paving expenses - - **60**
See LONDON. 3.

LANDLORD AND TENANT—*Compensation for Improvements—Market Garden—"Contract of tenancy current at the commencement of the Act"—Tenancy from Year to Year—Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *ss.* 1, 3, 4—*Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 61—*Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *s.* 42, *sub-s.* 2.

By virtue of s. 61 of the Agricultural Holdings (England) Act, 1883, of which Act the Market Gardeners' Compensation Act, 1895, is to be read as part, a tenancy from year to year under a contract of tenancy current at the commencement of the last-mentioned Act must for the purposes of that Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of the Act until the first day on which it could be determined by notice to quit given immediately after the commencement of the Act, and thereafter be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Act. *In re* KEDWELL AND FLINT & CO. - - **C. A. 797**

LANDLORD AND TENANT—*continued.*

2. —— *Distress for Rent—Charges—Man in Possession—Distress for Sum not exceeding 20l.—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1; *Schedule—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 8—*Distress for Rent Rules*, 1888, *rr.* 15, 16, *Appendix II., Scale II.*

By s. 1 of the Distress (Costs) Act, 1817, no person making a distress for rent where the sum demanded and due shall not exceed 20*l.* shall take other or more charges than those set forth in the schedule; and in the schedule the charge for "man in possession" is 2*s.* 6*d.* per day. By s. 8 of the Law of Distress Amendment Act, 1888, the Lord Chancellor may make rules "for regulating the fees, charges, and expenses in and incidental to distresses." By r. 15 of the Distress for Rent Rules, 1888, made by the Lord Chancellor under the above section, "no person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in and authorized by the table in Appendix II. to these rules"; and by r. 16, where the rent due exceeds 20*l.* the fees, charges, and expenses specified in scale I. shall be allowed, and where it does not exceed 20*l.* the fees, charges, and expenses specified in scale II. shall be allowed. Scale II. allows "for man in possession, 4*s.* 6*d.* per day: to provide his own board in every case":—

Held, that the Lord Chancellor had power under s. 8 of the Law of Distress Amendment Act, 1888, to make rules authorizing a scale of fees, charges, and expenses which should supersede the scale in the schedule to the Distress (Costs) Act, 1817, and that therefore the charge of 4*s.* 6*d.* per day for a man in possession authorized by the scale where the rent due did not exceed 20*l.* was not ultra vires. WALKER *v.* RETTER
Div. Ct. 1103

3. —— *Lease — Executed Contract — Rescission — Innocent Misrepresentation — County Court — Equitable Jurisdiction — Cancelling Agreement for Lease—"Value of the property"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 67.

A Court of Equity will not grant rescission of an executed lease on the ground of an innocent misrepresentation.

Legge v. *Croker*, (1811) 1 Ball & B. 506, followed.

By s. 67 of the County Courts Act, 1888, it is enacted that the county court shall have all the powers of the High Court in actions for (among other things) the cancelling of any agreement for the lease of any property where the value of the property shall not exceed the sum of 500*l.*

The plaintiff agreed to take and the defendant agreed to grant a lease of certain premises for a term of years. The value of the interest which the defendant agreed to grant to the plaintiff did not exceed the sum of 500*l.*; neither did the value of the defendant's whole interest in the premises exceed the sum of 500*l.*; the value of the freehold interest in the premises exceeded the sum of 500*l.*:—

Held, that the county court had no jurisdiction to order cancellation of the agreement.

LANDLORD AND TENANT—*continued.*

Semble, that the words "the value of the property" in the above enactment mean the value of the fee simple. ANGEL *v.* JAY
Div. Ct. 666

4. —— *Lease — House let to kept Woman — Immoral Purpose — Right to recover Rent.*

The plaintiff by his agent let a flat to the defendant for a term of three years. The agent knew that the defendant was the mistress of a certain man, and he assumed that the rent would come through her being a kept woman and would come from the man whose mistress she was; and he knew that the man went constantly to the flat to visit her. After the expiration of the term the defendant continued as tenant from year to year. In an action to recover the rent:—

Held, that as the flat was let for an immoral purpose the plaintiff was not entitled to recover. UPFILL *v.* WRIGHT - - - **Div. Ct. 506**

5. —— *Lease — Underlease — Covenants to Repair in similar Terms — Breach by Lessee — Forfeiture — Relief — Costs — Breach by Underlessee — Damages — Remoteness.*

An underlease made in 1887 contained covenants by the underlessee to repair in general terms and to repair within three months after notice in writing, and a proviso for re-entry on breach of the underlessee's covenants. The underlease shewed on its face that the reversion was a leasehold reversion. The head lease made in 1855 contained covenants to repair and a proviso for re-entry in substantially the same terms as those of the covenants and proviso in the underlease of 1887. The head landlord served on his lessee a notice in writing to repair; that lessee served a similar notice on his underlessee, who failed to do the repairs within three months. The head landlord thereupon brought an action for the recovery of the demised premises. The repairs were subsequently executed and the lessee applied for and obtained relief against forfeiture.

In an action by the lessee against the underlessee for breach of covenant to repair in the underlease:—

Held, that the plaintiff could not recover the costs of the proceedings for relief.

Dictum of Lindley L.J. in *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, followed. CLARE *v.* DOBSON
Lord Coleridge J. 35

6. —— *Repairs — Lessee's Covenant — "Keep in thorough repair and good condition" — Old Building — Natural Decay — Dangerous Structure Notice — Rebuilding — Liability of Lessee.*

A lease of a house in London contained a covenant by the lessee to substantially repair and keep in thorough repair and good condition the demised premises, and at the end or sooner determination of the term to deliver up the same to the lessors so repaired and kept. Subsequently the reversion expectant on the lease was assigned to the plaintiff and the lease to the defendants. Shortly before the expiration of the term the London County Council served a notice on the owner and occupiers requiring them to take down the front external wall of

LANDLORD AND TENANT—*continued.*

the house to the level of the ground floor as being a dangerous structure, and the plaintiff called upon the defendants to comply with this notice, which they failed to do. After the expiration of the term the plaintiff, in compliance with a demolition order of a police magistrate, took down the wall to the level of the ground floor, and then, in compliance with a further notice of the London County Council, took down the remainder of the wall and rebuilt it in accordance with modern requirements. The house was very old, and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it:—

Held, that the defendants were liable under the covenant to recoup the plaintiff the cost of taking down and rebuilding the wall.

The extent of a tenant's obligation under repairing covenants in a lease considered.

Lister v. *Lane*, [1893] 2 Q. B. 212, and *Torrens* v. *Walker*, [1906] 2 Ch. 166, distinguished. LURCOTT *v.* WAKELY & WHEELER
C. A. 905

—— Distress — Exemption — Hire-purchase agreement — Piano let to wife of tenant - - - - - - **19**
See DISTRESS.

LANDS CLAUSES ACTS—*Arbitration — Costs — Offer by Promoters — Conditional Offer — Lands Clauses Consolidation Act*, 1845 (8 *& 9 Vict. c.* 18), *s.* 34.

By s. 34 of the Lands Clauses Consolidation Act, 1845, the costs of an arbitration under the Act are to be borne by the promoters of the undertaking in question unless the arbitrators award the same sum as or a less sum than shall have been offered by the promoters, in which case each party is to bear his own costs.

A company were by a private Act incorporating the Lands Clauses Consolidation Act, 1845, empowered to construct a bridge, and on completion thereof to divert a public footpath which crossed the plaintiff's land. The company constructed the bridge and diverted the footpath. The plaintiff claimed that his land was injuriously affected; he gave notice that he desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845, and appointed an arbitrator. The company then sent to the plaintiff's solicitors a letter to this effect: "The company have made arrangements for the construction of a forty feet road, which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. The road will be made as soon as practicable, and on the understanding that it will be made we make your client an offer of 50*l.* in settlement of his claim." This offer was refused, and the parties proceeded to arbitration, in which 50*l.* was awarded to the plaintiff as compensation.

Upon a special case stated between the parties in an action by the plaintiff against the company to recover his costs of the arbitration:—

LANDS CLAUSES ACTS—*continued.*

Held (affirming the decision of Phillimore J., reported [1910] 2 K. B. 252), that the offer contained in the above letter was not a good offer under s. 34 of the Lands Clauses Consolidation Act, 1845. FISHER *v.* GREAT WESTERN RAILWAY COMPANY - - - - - **C. A. 551**

—— Compensation under—Award—Action on—When statute begins to run—Limitation of action - - - - - **832**
See LIMITATION OF ACTION.

LARCENY—Evidence of asportavit - - **674**
See CRIMINAL LAW. 4.

—— Fixtures—Agreement for tenancy of house—Taking possession with intention to steal fixtures - - - - - **260**
See CRIMINAL LAW. 5.

—— Sale of goods—Larceny by a trick—Goods on sale or return—Power given to pass property in goods—Fraud - - **463**
See CONTRACT. 1

LEASE.
See under LANDLORD AND TENANT.

LICENCE—Carriages.
See under REVENUE.

—— Cinematograph.
See under CINEMATOGRAPH.

—— Game.
See under GAME.

—— Hotel, Manager of—Undisclosed principal—Licence in name of manager—Unauthorized purchase by manager—Liability of owners - - - **459**
See PRINCIPAL AND AGENT.

LIEN—Contract of affreightment—Bill of lading—Lien for dead freight—Necessity for deviation - - - - - - **625**
See SHIPPING. 2.

LIMITATION OF ACTION—*Compensation under Lands Clauses Act—Award—Action on—When Statute begins to run.*

The period within which an action may be brought to enforce an award of compensation made by an arbitrator under the Lands Clauses Act, 1845, is six years from the date of the award. TURNER *v.* MIDLAND RAILWAY COMPANY - - - - - **Div. Ct. 832**

LOCAL GOVERNMENT—*Local Grants—Maintenance of Pauper Lunatics—Sums payable by County Council to Poor Law Guardians—Date of Accrual of Cause of Action—"Period of maintenance"—Net Charge upon Guardians equal to or exceeding 4s. a week—Deduction of Sums received by Guardians from Source other than Rates—Sums received after Period of Maintenance—Money had and received to Use of County Council—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-s.* 2 (*f*); *s.* 80.

By ss. 20, 21, and 23 of the Local Government Act, 1888, the duties on local taxation licences and a portion of the probate duties are to be paid to the council of each county and by them paid into the county fund.

By s. 24, sub-s. 1, the annual grants made out of the Exchequer in aid of the local rates (called local grants) are to cease; and by sub-s. 2, "In substitution for local grants, the council of each county shall from time to time . . . . pay out of the county fund . . . . the following sums, that is to say . . . . (*f*) They shall pay to the guardians of every poor law union wholly or partly in the county a sum equal to four shillings a week for each pauper lunatic chargeable to that union, and maintained in an asylum, registered hospital, or licensed house, for whom the net charge upon the guardians, after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates, is equal to or exceeds four shillings a week throughout the period of maintenance for which the sum is so paid."

By s. 80, all payments out of the county fund shall be made by the county treasurer in pursuance of an order of the council, and no such order shall be made by the council except in pursuance of a resolution of the council passed on the recommendation of the finance committee.

The "period of maintenance" of pauper lunatics chargeable to the poor law unions in a county was fixed by the practice adopted by the county council and the guardians as the twelve months ending on September 30 in each year. A pauper lunatic was maintained by the guardians of a union from 1902 until her death in May, 1907. In respect of each of the four years ending September 30, 1907, the county council paid to the guardians a sum equal to 4*s.* a week towards the cost of the pauper lunatic's maintenance during the year. By an order of the county court in 1902, made under s. 132 of the Lunacy Act, 1890, a sum of money to which the lunatic was entitled was vested in the clerk to the guardians to be applied to the maintenance of the lunatic or in reimbursement of moneys from time to time expended by the guardians for her maintenance as the judge might from time to time direct. No application was made to the Court for payment of any part of this sum towards the lunatic's maintenance until after her death, when an order was made for payment to the guardians of a sum equal to the total cost of her maintenance during the whole time she was maintained by the guardians. The county council claimed to recover from the guardians as money had and received to their use a sum equal to the amount which they had paid to the guardians towards the cost of the lunatic's maintenance during the four years ending September 30, 1907. The guardians contended that the accounts for those years had been closed and settled at the end of each year, and that therefore the claim would not lie:—

Held, that the county council were entitled to recover the amount claimed as money had and received to their use.

During the year ending September 30, 1908, the guardians of a union received from a source other than local rates towards the cost of

LOCAL GOVERNMENT—*continued.*

maintenance of a pauper lunatic during the preceding year a sum of money which had not been brought into the accounts of that year. The county council claimed that this sum should be deducted from the cost of maintenance of the pauper lunatic during the year in which it was actually received so as to arrive at the net charge upon the guardians for the maintenance of the pauper lunatic during that year :—

Held, that the claim of the county council was right.

The accounts of the guardians for the year ending September 30, 1909, shewing a sum to be due from the council to the guardians in respect of the cost of maintenance of pauper lunatics during that year, were lodged with the county council on December 1, 1909. The next meeting of the council after December 1, 1909, was on February 16, 1910, and that was followed by a meeting on March 16. There were in the county nineteen poor law unions whose accounts had to be examined by the council, and the examination would take some weeks. The finance committee at a meeting on February 22, 1910, passed the accounts, and the council at their meeting in March made an order for payment of the amount due, and the amount was paid. The guardians in the meantime brought an action on January 31, 1910, against the council to recover the amount appearing on the accounts to be due :—

Held, that the amount did not become payable until the necessary time had elapsed to make the payment by the county council lawful, that is to say, until the council had a reasonable time to examine the accounts and until after the meetings of the finance committee and the council, and that therefore no cause of action had arisen when the action was commenced.
CALNE UNION *v.* WILTS COUNTY COUNCIL
Hamilton J. 717

—— Borrowing powers — Security for loan— Urban authority - - - - **680**
See CORPORATION.

LOCOMOTIVES—Highways and locomotives.
See under HIGHWAY.

LONDON—*Building—Means of Escape in Case of Fire—"Dwelling-house occupied as such by not more than two families"—Public-house—Employees living in House—London Building Acts Amendment Act*, 1905 (5 *Edw.* 7, *c. ccix.*), *s.* 12.

By s. 12, sub-s. 1, of the London Building Acts Amendment Act, 1905, every existing building to which s. 10 applies, "and every other existing building except a dwelling-house occupied as such by not more than two families," shall, if having more than two storeys above the ground storey, be provided with certain specified means of access to the roof. Sect. 24, sub-s. 1 (*e*), renders a person liable to a penalty who fails to comply with the provisions of s. 12.

A fully-licensed public-house contained four storeys above the basement. The ground floor was used almost entirely as a bar. There were two sitting rooms on the first floor and six bedrooms on the two upper floors. The house

LONDON—*continued.*

was inhabited by thirteen persons, namely, the tenant, his wife and three children, their servant, and the members of the public-house staff, all of whom slept there. Upon an information for non-compliance with the provisions of s. 12 the magistrate was of opinion that the house was a dwelling-house and that it was occupied as such by one family only, and that therefore s. 12 did not apply :—

Held, that upon the facts the magistrate was justified in finding that the house was a dwelling-house occupied as such by one family, and was therefore within the exemption in s. 12, it being impossible to draw a distinction between the tenant's servant and the members of the public-house staff, and to say that the latter were not equally members of the same family as the former. LONDON COUNTY COUNCIL *v.* CANNON BREWERY COMPANY
Div. Ct. 235

2. —— *Building—Notice to set back—Forecourt or other space—London Building Act*, 1898 (61 & 62 *Vict. c. cxxxvii.*), *s.* 3.

Sect. 3 of the London Building Act, 1898, does not empower the London County Council to give notice requiring the owner or occupier of land upon which he has erected a new building to set back an old boundary wall, forming the boundary of a space left between the new building and a street, so that the wall shall not be less than the prescribed distance from the centre of the roadway of the street. REA *v.* LONDON COUNTY COUNCIL - - **Div. Ct. 740**

3. —— *New Street — Paving Expenses — Alteration of Width of Carriageway and Footpath—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

The council of a metropolitan borough, when proposing, in the exercise of the powers conferred by s. 105 of the Metropolis Management Act, 1855, to pave an old road which has become a new street, have no power to alter the respective widths of the carriageway and footpaths, so as to cast upon the frontagers the expense of throwing portions of the footpaths into the carriageway. WANDSWORTH BOROUGH COUNCIL *v.* GOLDS - - - - **Div. Ct. 60**

4. —— *Waterworks—Communication Pipe—Stop-Cock Box — Liability of Householder to repair—Power to break up Street for that Purpose—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 19.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, it is provided that the Board shall at the request of the owner or occupier of any house in a street in which any service main of the Board is laid furnish to such owner or occupier "by means of a communication pipe . . . . and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost" a sufficient supply of water for domestic purposes at a rate not exceeding 5 per cent. of the rateable value of the house :—

Held, that the section in so far as it imposes an obligation upon the householder to repair the

LONDON—*continued.*
communication pipe is not retrospective, and does not apply to communication pipes in existence at the date of the passing of the Act. BATT *v.* METROPOLITAN WATER BOARD **Div. Ct. 845**

LUNACY—*Pauper Lunatic—Expenses of Maintenance—Reasonable Charges—Order of Justices—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 283, 287.
On an application to justices for an order under s. 287 of the Lunacy Act, 1890, for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians; and in fixing that amount the justices are not restricted to the limit of 14*s.* a week imposed by s. 283.
Dictum of Wright J. in *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494, overruled.
Where, owing to special circumstances, the application to the justices is for a sum exceeding the weekly sum fixed by the visiting committee under s. 283, the order ought not to be made ex parte; and the order, whether made ex parte or on notice, ought to be not absolute in form, but until further order only.
The decision of a Divisional Court (Bray and Lord Coleridge JJ.), [1910] 2 K. B. 547, affirmed. GLAMORGAN COUNTY ASYLUM (COMMITTEE OF VISITORS) *v.* CARDIFF GUARDIANS **C. A. 437**

——Maintenance of pauper lunatics—Local grants - - - - - - **717**
See LOCAL GOVERNMENT.

MAGISTRATES.
See under JUSTICES.

MAINTENANCE—Lunatic.
See under LUNACY.

MANAGER — Hotel — Licence in name of manager — Unauthorized purchase by manager—Liability of owners - **459**
See PRINCIPAL AND AGENT.

MANDAMUS—*Sufficiency of Interest of Prosecutor.*
Where petitioners appear in opposition to a Bill before Parliament, and, with the object of protecting their own interests, procure the insertion in the Bill of a clause imposing a particular duty upon the promoters or other persons, they will have a sufficient interest in the performance of that duty to support an application by them for a mandamus to enforce it, notwithstanding that they are not named in the clause, and that the duty is one imposed for the benefit of the public at large.
So *held* by Lord Alverstone C.J. and Pickford J., Avory J. doubting.
THE KING *v.* MANCHESTER CORPORATION **Div. Ct. 460**

MARGARINE—*Sale by Retail—Printed Matter on Wrapper — "Fancy or other descriptive name"—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 6—*Butter and Margarine Act*, 1907 (7 *Edw.* 7, *c.* 21), *s.* 8.
Sect. 6 of the Sale of Food and Drugs Act, 1899, which provides, in amendment of s. 6 of the Margarine Act, 1887, that no other printed matter than the word "margarine" shall appear "on" the paper wrapper in which margarine is delivered to a purchaser, is not repealed by s. 8 of the Butter and Margarine Act, 1907, which permits margarine to be described "in" a wrapper by a name combining the word "margarine" with a fancy or descriptive word approved by the Board of Agriculture and Fisheries. It is, therefore, an offence, on a sale of a kind of margarine called "Karmo" (an approved fancy or descriptive word), to deliver it to the purchaser in a paper wrapper on which are printed the words "Karmo margarine."
WILLIAMS *v.* BAKER - - **Div. Ct. 566**

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARKET GARDEN—Compensation for improvements—Agricultural holdings - **797**
See LANDLORD AND TENANT. 1.

"MARKETABLE SECURITY"—Stamp—Debentures purporting to create charge on ships - - - - - - **1078**
See REVENUE. 4.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MEETING—Lawful public meeting — Meeting held on highway—Legality of - **337**
See CRIMINAL LAW. 6.

MEMBERS — Company — List of members — Default in sending to Registrar — No annual general meeting - - **588**
See COMPANY. 3.

MERCHANDISE MARKS—*Trade Description—Application of to Goods—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 5, *sub-ss.* 1, 2.
By s. 5, sub-s. 1, of the Merchandise Marks Act, 1887, "A person shall be deemed to apply a . . . . trade description" (which by s. 3, sub-s. 3, includes any name of a person) "to goods who —(*c*) encloses . . . . any goods which are sold . . . . in . . . . any covering . . . . to which a . . . . trade description has been applied." Sub-s. 2: "The expression 'covering' includes any . . . . bottle."
The appellant, a bottler of beer, having in the course of his business come into possession of certain bottles belonging to the F. Brewery Company and embossed with that company's name, filled them with beer brewed by Bass & Co., placed Bass & Co.'s labels upon them, and sold the contents as being Bass & Co.'s beer:—
Held, that the appellant had applied a false trade description, namely, the F. Brewery Company's name, to the beer none the less because the presence of the Bass labels on the bottles would prevent any reasonable purchaser from supposing that he was buying anything but Bass's beer. STONE *v.* BURN - **Div. Ct. 927**

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

METROPOLITAN POLICE COURTS ACT, 1839
See BAILMENT. 499

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907 - - - - - 845
See LONDON. 4.

MISREPRESENTATION — Lease — Executed contract — Rescission — Innocent misrepresentation - - - - - 666
See LANDLORD AND TENANT. 3.

MISTAKE—Workmen's compensation—Reasonable cause for not giving notice—Ignorance of existence of Act - 982
See EMPLOYER AND WORKMAN. 10.

MONEY HAD AND RECEIVED—to use of county council—Local grants—Maintenance of pauper lunatics - - 717
See LOCAL GOVERNMENT.

MONEY-LENDER—*Carrying on Business in more than one Name—Trading alone and as Member of a Firm—Registration in respect of each Business—Liability to Penalty—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 2.

A money-lender who in fact carries on business in more than one name does not the less offend against s. 2, sub-s. 2, of the Money-lenders Act, 1900, because through a mistake of the registration authorities he has succeeded in getting himself registered in respect of both businesses. WHITEMAN *v.* DIRECTOR OF PUBLIC PROSECUTIONS - - - - Div. Ct. 824

—— Pawnbroker—Loan of 50*l.* on bill of sale—Business of money-lending - - 792
See PAWNBROKER.

MORTGAGE—Rent-charge—Mortgage of land subject to—Possession of land not taken by mortgagee—Liability of mortgagee for rent - - - - - - 513
See RENT-CHARGE.

MOTOR CAR—*User at Night without Rear Light—Motor Car (Registration and Licensing) Order*, 1903, *art. XI.—Conviction—Indorsement of Licence—Offence under the Motor Car Act*, 1903—*Offence in connection with Driving—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 2, *sub-s.* 4; *s.* 4, *sub-s.* 1 (*c*), *sub-s.* 2.

Sect. 4 of the Motor Car Act, 1903, provides that any Court before whom a person is convicted of an offence "under this Act or of any offence in connection with the driving of a motor car" shall cause particulars of the conviction to be indorsed on his licence; and failure to produce a licence for the purposes of indorsement is made an offence.

The respondent having been convicted of using a motor car at night on a public highway without having a lamp burning on the back of the car as required by art. XI. of the Motor Car (Registration and Licensing) Order, 1903, was called upon to produce his licence for the purposes of indorsement, and, having failed to do so, he was charged with the commission of an offence under s. 4 of the Act of 1903. The justices dismissed the charge:—

Held, that the respondent should have been convicted, as the offence of which he had been convicted was an offence under the Motor Car Act, 1903.

Held, further, by Lord Alverstone C.J. and Avory J., that it was also "an offence in connection with the driving of a motor car." BROWN *v.* CROSSLEY - - - Div. Ct. 603

MOTOR CAR (REGISTRATION AND LICENSING) ORDER, 1903, art. XI. - 603
See MOTOR CAR.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAVIGATION—Rights of—Harbour—Right of shipowner to move coal hulk in navigable harbour—Trespass - - 171
See HARBOUR.

NEGLIGENCE—*Cause of Action—Injuria sine damno—Contract of Towage—Tow sunk by Negligence of Third Party—Loss to Tug Owner of Towage Remuneration.*

A steam tug belonging to the plaintiffs was engaged under a towage contract in towing a ship when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision with and sank the tow. No damage was caused to the tug or her equipment by the collision.

In an action brought by the plaintiffs to recover from the defendant as damages the amount of towage remuneration which they would have earned if they had completed the towage contract:—

Held, that the plaintiffs had no cause of action, for, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

Cattle v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453, followed. LA SOCIÉTÉ ANONYME DE REMORQUAGE À HÉLICE *v.* BENNETTS - - - - Hamilton J. 243

—— Bailment — Warehouseman — Claim by third party to goods bailed—Duty of bailee—Notice of claim to bailor - 499
See BAILMENT.

—— Signature to document obtained by fraud — Guarantee — Defence of non est factum—Estoppel—Proximate cause of loss - - - - - - 489
See CONTRACT. 2.

—— Workmen's compensation—Negligence of employer and also of third party - 114
See EMPLOYER AND WORKMAN. 9.

NEGOTIABLE INSTRUMENT—*Promissory Note—Signature procured by Duress—Knowledge of Duress by Holder of Instrument—Burden of*

NEGOTIABLE INSTRUMENT—*continued.*

Proof—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 30, *sub-s.* 2.

To an action against a wife upon joint and several promissory notes of her husband and herself, signed by her as surety for the repayment of sums advanced by the plaintiff to her husband, the defendant pleaded that she was induced to sign the notes by duress on the part of her husband, and that the plaintiff knew of that duress. At the trial evidence was given by the defendant of the duress so alleged, and the jury found that there was such duress. No evidence, however, was given on the defendant's part to shew that the plaintiff knew of the duress, but on the contrary she stated in evidence that she did not think that the plaintiff knew of it. The plaintiff was not called as a witness, and, consequently, did not give evidence to negative his knowledge of the duress :—

Held, that the onus of proof with regard to knowledge of the duress by the plaintiff lay upon the defendant, and was not shifted by s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, upon the plaintiff, and, therefore, the plaintiff must succeed.

The provision of s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, by which, "if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill," does not apply to a case where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose possession it remains. TALBOT *v.* VON BORIS AND WIFE - - - - - **C. A. 854**

NEWTAKE—Dartmoor Forest—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant—Distress - - - - - **649**
See COMMON.

NEW ZEALAND — Bankruptcy — Domicil — Personalty in England — Subsequent English bankruptcy — Statutory assignees—Notice—Priorities - **896**
See BANKRUPTCY. 3.

NOTICE—Domicil—New Zealand bankruptcy—Personalty in England — Subsequent English bankruptcy — Statutory assignees—Notice—Priorities - **896**
See BANKRUPTCY. 3.

—— Workmen's compensation — Reasonable cause for not giving notice—Mistake—Ignorance of existence of Act - **982**
See EMPLOYER AND WORKMAN. 10.

NUISANCE—*Public Nuisance—Special Damage—Obstruction of View—Pecuniary Loss.*

The plaintiff was in possession of a house from the windows of which there was an uninterrupted view of part of a certain main thoroughfare along which it was announced that a public procession was to pass. One G. agreed to take and pay for seats on the first and second floors of the house in order to see the procession. The defendants, in pursuance of a resolution of their council to that effect, caused a stand to be erected across a certain highway (in which the plaintiff's house was situate) to enable the members of the council and their friends to view the procession. This stand was a public nuisance, and it obstructed the view of the main thoroughfare from the windows on the first floor of the plaintiff's house. G., when he saw the stand in process of erection, asked to be released from his contract as to the seats on the first floor, and the plaintiff, thinking it would be unfair to hold him bound, released him. Several other persons came to the house to apply for seats, but when they saw the obstruction refrained from taking seats.

In an action by the plaintiff to recover damages for the wrongful interference with the use and enjoymnet of her house and the special loss she had sustained by the wrongful act of the defendants :—

Held, that she was entitled to recover as damages the profit which but for the defendants' act she might have made by letting seats. CAMPBELL *v.* PADDINGTON CORPORATION **Div. Ct. 869**

NUISANCE—*continued.*

OATHS—Deed of arrangement—Registration—Validity—Affidavit sworn before solicitor to the parties—Bankruptcy notice
See BANKRUPTCY. 2. **317**

ONUS OF PROOF — Fraud — Sale of goods—Voidable contract—Pledge by purchaser—Larceny by a trick - - - **463**
See CONTRACT. 1.

PARLIAMENT—*Franchise—County Franchise—Borough Franchise—Freehold—Flat—"House or other building occupied by himself"—Representation of the People Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 24.

By s. 24 of the Representation of the People Act, 1832, it is enacted that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament in respect of his estate or interest as a freeholder in any house, warehouse, countinghouse, shop, or other building occupied by himself, such house, warehouse, &c., being of such value as would confer on him the right of voting for any city or borough.

The appellant had an estate or interest as a freeholder in a two-storey building, each storey of which formed a separate dwelling-house entered by a separate outer door. He occupied the upper storey himself. The lower storey was let or to let to a tenant :—

Held, that the lower storey was not occupied by the appellant himself within the meaning of the above enactment, and that the appellant was entitled to vote in the election of a member for the county in respect of his freehold estate or interest therein. DOUGLAS *v.* SANDERSON. POTTS *v.* SANDERSON - - - **Div. Ct. 166**

PAVING EXPENSES—New street—Alteration of width of carriageway and footpath - - - - - - - **60**
See LONDON. 3.

PAWNBROKER—*Loan of 50l. on Bill of Sale—Business of Money-lending—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 6 (*a*)—*Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 10.

The fact that a pawnbroker has on one occasion lent money on the security of a bill of sale does not make him a money-lender within the meaning of the Money-lenders Act, 1900. NEWMAN *v.* OUGHTON; POND & OUGHTON, CLAIMANTS - - - - - **Div. Ct. 792**

PENALTY—Copyright—Picture—Injunction—Penalties—Action to recover - **771**
See COPYRIGHT.

PETITION OF RIGHT—Action on—Declaratory judgment—Attorney-General defendant—Relief against the Crown - - **410**
See PRACTICE.

PHARMACY.
See under POISON.

PICTURE—Copyright.
See under COPYRIGHT.

POISON—*Insecticide—Sale of by Unlicensed Assistant of Licensed Shopkeeper—Liability of Assistant to Penalty—Poisons and Pharmacy Act*, 1908 (8 *Edw.* 7, *c.* 55), *s.* 2.

By s. 2 of the Poisons and Pharmacy Act, 1908, "So much of the Pharmacy Act, 1868, as makes it an offence for any person to sell . . . . poisons unless he is a duly registered pharmaceutical chemist . . . . shall not apply in the case of" certain specified "poisonous substances to be used exclusively in agriculture or horticulture . . . . if the person so selling . . . . is duly licensed for the purpose" under that section:—

Held, that the words "the person so selling" include the person actually conducting the sale; and that an unlicensed shop assistant who sells on behalf of his master one of the specified poisonous substances is not protected from the liability to the penalty imposed by the Pharmacy Act, 1868, by the fact that his master is duly licensed. PHARMACEUTICAL SOCIETY *v.* NASH **Div. Ct. 520**

POLICY—Insurance (Burglary).
See under INSURANCE (BURGLARY).

POOR LAW—*Settlement by Residence—Irremovability—Residence of Child under Sixteen with deserted Mother—Acquisition of Settlement under Sixteen—Settlement and Removal—Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *ss.* 1, 3—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A legitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence in a parish with its deserted mother who is irremovable therefrom:—

So *held* by the Court of Appeal, affirming the decision below (per Lord Alverstone C.J. and Pickford J., Darling J. dissenting), and following the opinions expressed in *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450, and *Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255. KINGSTON-UPON-HULL INCORPORATION FOR THE POOR *v.* HACKNEY UNION - **C. A. 748**

—— Lunacy—Maintenance of pauper lunatics—Local grants - - - - - **717**
See LOCAL GOVERNMENT.

POOR RATE.
See under RATES.

POUND—Dartmoor Forest—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant—Distress - - **649**
See COMMON.

PRACTICE—*Striking out Pleadings—Reasonable Cause of Action—Relief against the Crown—Declaratory Judgment—Attorney-General Defendant—Action or Petition of Right—Rules of Supreme Court*, 1883, *Order* XXV., *rr.* 4, 5—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *Form IV.*

Order XXV., r. 4,—which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action—was never intended to apply to any pleading which raises a question of general importance, or serious question of law.

The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff.

Hodge v. *Attorney-General*, (1838) 3 Y. & C. Ex. 342, examined and approved.

A declaratory judgment can, under Order XXV., r. 5, be made against the Attorney-General, as defendant representing the Crown, and a plaintiff is not bound in such a case to proceed by petition of right. DYSON *v.* ATTORNEY-GENERAL - - - - - - - **C. A. 410**

—— Criminal law.
See under CRIMINAL LAW.

PRINCIPAL AND AGENT—*Undisclosed Principal—Manager of Hotel—Licence in Name of Manager—Unauthorized Purchase by Manager—Liability of Owners.*

The decision of a Divisional Court (Pickford J. and Lord Coleridge J.), reported [1910] 2 K. B. 389, reversed. KINAHAN & Co. *v* PARRY - - - - - - - **C. A. 459**

—— Insurance (Burglary)—Principal in the second degree - - - - - **424**
See INSURANCE (BURGLARY).

PRIORITY—Domicil—New Zealand bankruptcy—Personalty in England—Subsequent English bankruptcy—Title of official assignee in New Zealand—Notice—Priorities - - - - - - **896**
See BANKRUPTCY. 3.

PROBATION OF OFFENDERS ACT, 1907 - 77
See CRIMINAL LAW. 3.

PROMISSORY NOTE—Signature procured by duress—Knowledge of duress by holder of instrument—Burden of proof - **854**
See NEGOTIABLE INSTRUMENT.

PROMOTER—Fraudulent—Bankruptcy of promoter—Proof - - - - - **95**
See BANKRUPTCY. 4.

PROOF—Company, Formation of—Fraudulent promoter—Bankruptcy of promoter—Proof - - - - - - - **95**
See BANKRUPTCY. 4.

—— Promissory note—Signature procured by duress—Knowledge of duress by holder of instrument—Burden of proof - **854**
See NEGOTIABLE INSTRUMENT.

—— Workmen's compensation—Fatal accident—Dependants—Evidence—Inference—Onus of proof - - - - - **1036**
See EMPLOYER AND WORKMAN. 1.

PUBLIC HEALTH—Rates.
See under RATES.

PUBLIC-HOUSE—London building—Means of escape in case of fire - - - **235**
See LONDON. 1.

PUBLIC NUISANCE.
See under NUISANCE.

PURSER—Workmen's compensation—Bonus—Perquisites - - - - - - **360**
See EMPLOYER AND WORKMAN. 17.

QUARTER SESSIONS—Indictment at quarter sessions—True bill—Jurisdiction of quarter sessions—Summary jurisdiction
See JUSTICES. 2. **612**

—— Power of, to sentence—Inherent jurisdiction—Conditional discharge—Recognizance - - - - - - - **77**
See CRIMINAL LAW. 3.

RACECOURSE—Street betting - - - **57**
See BETTING.

RAILWAY—*Carriage of Goods*—"*Reasonable Facilities*"—*Provision of Truck by Trader*—*Reduction of Rate where Company does not provide Truck*—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2—*Great Western Railway Company* (*Rates and Charges*) *Order Confirmation Act*, 1891 (54 *&* 55 *Vict. c. ccxxii.*), *Sched. I., s.* 2 (*b*).

A railway company is under no legal obligation to convey on its railway under all circumstances trucks belonging to a trader and loaded with the trader's goods on payment of tolls based on rates of carriage applicable to such goods alone. But if a railway company fails to provide sufficient trucks for the conveyance of the goods of a particular trader the latter may provide his own trucks, and in that case the provision of motive power for the haulage of the trader's trucks is a reasonable facility for the forwarding and delivering of traffic within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854. The question whether in a given case such provision is a reasonable facility is a question of fact for the Railway and Canal Commission, whose decision is final.

The provision in s. 2 (*b*) of the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, for the reduction of the authorized rate for conveyance where "the company do not provide trucks" in which merchandise is carried on the railway does not apply where, although the company is ready and willing to provide sufficient trucks, the trader prefers to use his own trucks, but only applies to cases where the trader uses his own trucks in order to supplement a deficiency in the supply of trucks by the company.

The decision of the Railway and Canal Commission, reported [1910] 1 K. B. 778, affirmed. SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY (ASSOCIATION OF PRIVATE OWNERS OF RAILWAY ROLLING STOCK, INTERVENERS) - - - **C. A. 386**

2. —— *Rates — Reasonable Facilities — Agreed Through Rates—Application for Through Rates of same Amount but differently apportioned —Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act*, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 25.

Where there is an agreed through rate for through traffic over the lines of two railway companies, and an agreed apportionment between the two companies which has not been cancelled, the Railway and Canal Commissioners have no jurisdiction to make a fresh apportionment of that agreed rate, or of one of the same amount, at the instance of one of the railway companies; the duty and power of apportionment being incidental only to the fixing of reasonable facilities for the conveyance of through traffic from one point to another.

Decision of the Railway and Canal Commissioners, [1910] 2 K. B. 913, affirmed. MANCHESTER SHIP CANAL COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **C. A. 657**

3. —— *Rates—Undue Preference and Undue Prejudice—Reasonable Facilities—Lease of Wharf at Station by Railway Company to Trader—Railway Company reserving Right to choose Route for Traffic to and from Wharf—Direction to send Through Traffic by one of two competing Lines—Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2.

The defendants, a railway company, who were the owners of land adjoining or near to certain of their stations, by agreements in writing let portions of the land to traders for use as coal wharves. The agreements contained a clause by which the tenant of each wharf agreed that he would order all traffic forwarded to the wharf to be consigned by the defendants' route, and, the rates being equal, that the defendants should decide by what routes the traffic consigned over their own and other railway routes should travel. Coal traffic from certain collieries in the Midlands to stations on the defendants' railway could be consigned either by the applicants' railway or by the Great Northern Company's railway, there

RAILWAY—*continued.*

being competition between the two companies for the traffic. The through rates by each route were the same, but the Great Northern Railway Company allowed to the defendants a larger proportion of the through rates than the applicants allowed. The defendants required the tenants of their wharves to have their coal from the collieries consigned to the wharves by the Great Northern Railway. The applicants complained that the defendants were thereby infringing the provisions of s. 2 of the Railway and Canal Traffic Act, 1854, and applied for an order that the defendants should afford due and reasonable facilities for the receiving, forwarding, and delivering of coal traffic passing between the applicants' railway and places on the defendants' railway, and that they should be restrained from giving undue and unreasonable preference to the Great Northern Railway Company, and from subjecting the applicants and their traffic to undue and unreasonable prejudice :—

Held, that the acts of the defendants were not, so far as regards the applicants, a contravention of the provisions of s. 2 of the Act, and that the applicants were therefore not entitled to the order asked for. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* SOUTH EASTERN RAILWAY COMPANY, LONDON, CHATHAM, AND DOVER RAILWAY COMPANY, AND SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE
Railway and Canal Commission 534

RAILWAY AND CANAL TRAFFIC.
See under RAILWAY.

RATES—*General District Rate—Power to rate Owner instead of Occupier—Reduced Assessment—Owner in Occupation of Premises—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*a*).

The provisions of s. 211, sub-s. 1 (*a*), of the Public Health Act, 1875, as to assessing an owner on a reduced annual value, where the owner is rated instead of the occupier, do not apply to a case where the owner is himself the occupier of the premises to be rated. THE KING *v.* PROPERT
Div. Ct. 83

2. —— *Justice of the Peace—Poor Rate—Exemption—Distress Warrant—Jurisdiction to refuse Warrant—Property acquired and used for Purposes of the Crown—Territorial Force—County Association—Officer's Quarters—Territorial and Reserve Forces Act*, 1907 (7 *Edw. 7, c.* 9).

Houses acquired by a county association under the Territorial and Reserve Forces Act, 1907, for use, and in fact used, as residences for officers of the Territorial Force, are occupied by servants of the Crown for the purposes of the Crown, and are therefore exempt from rateability to the poor rate. This exemption is a matter which may be raised before and considered by justices on an application for a distress warrant to enforce a rate made upon such an officer in respect of a house so acquired.

Whether such an officer is the occupier of a house so acquired, *quære.*

RATES—*continued.*

Justices are not bound to issue a distress warrant if on the undisputed facts before them it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought not to have been inserted in the rate-book. WIXON *v.* THOMAS. LAMBERT *v.* THOMAS. BURROWS *v.* THOMAS - - - - - **Div. Ct. 43**

3. —— *Waterworks—Gathering Ground for Waterworks—Liability to Poor Rate—Part of Gathering Ground used as Plantations and Nurseries for young Trees—Rateable Value—Evidence of Price paid for Gathering Ground.*

The appellants, who were owners and occupiers of a system of reservoirs and waterworks, bought the greater part of land which formed a gathering ground for their waterworks; the water which flowed naturally from the gathering ground being received into their reservoirs and waterworks. A portion of the land so bought (1165 acres in extent) consisted partly of agricultural land with farmhouses and buildings on it, and more largely of moorland. In order to reduce the population and the cattle on the 1165 acres and so diminish the risk of pollution of the water flowing therefrom, the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon and abolished certain rights of pasture and turbary which had previously been enjoyed thereon and limited the user thereof to purposes of sporting and afforestation.

They planted 297½ acres with trees for the purpose of improving the shooting and utilized 8½ acres as a nursery for young trees and enclosed the planted area in a ring fence. The remaining 859 acres was moorland already enclosed by a fence when the appellants bought it. They had made a few grips in the planted area for the purpose of adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the land to the waterworks of the appellants. Inside one of the plantations was a spring of water. In order to prevent the water therefrom from accumulating in the plantation it was conveyed by the appellants in a pipe through a portion of the plantation and along the side of a road to a trough which supplied water to a village outside any lands of the appellants. Any water not used to fill the trough flowed to the waterworks of the appellants. The sporting rights over the land were let by the appellants. The gamekeeper of the lessee with the authority of the appellants warned trespassers off the land. Since the purchase of the land by the appellants trespassers had been more rigorously excluded from the land than before :—

Held, that the appellants used and controlled the 1165 acres for the purpose of securing a water supply to their reservoirs and waterworks in a pure state and therefore were in beneficial occupation of the 859 acres of moorland so as to be liable to be assessed to the poor rate in respect of that land.

Judgment of Lord Atkinson in *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 7, explained.

RATES—*continued.*

The rating authorities having elected to assess the land used as plantations and nurseries as a separate hereditament, and the appellants admitting that they were in rateable occupation of that land:—

Held, that that land ought to be assessed under s. 4 of the Rating Act, 1874, as being used for plantations and nurseries, and that the price paid by the appellants for the gathering ground was not admissible as evidence of the rateable value of the land so used. LIVERPOOL CORPORATION *v.* CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS **Div. Ct. 1057**

—— Railway.
See under RAILWAY.

—— Railway company — Reduction of rate where company does not provide truck
See RAILWAY. 1. **386**

—— Undue preference and undue prejudice—Lease of wharf at station by railway company to trader - - - **534**
See RAILWAY. 3.

—— Water rate payable by owner—Receipt of rent as agent or receiver - - **289**
See WATER.

RECEIVER — Company — Debentures — Remuneration, by whom payable - - **806**
See COMPANY.

RECOGNIZANCE — Conditional discharge — Power of quarter sessions to sentence
See CRIMINAL LAW. 3. **77**

REGISTRAR—County court.
See under COUNTY COURT.

REGISTRATION — Deed of arrangement — Validity - - - - - - **317**
See BANKRUPTCY. 2.

—— Money-lender.
See under MONEY-LENDER.

"REMUNERATION" — Workmen's compensation - - - - - - **360**
See EMPLOYER AND WORKMAN 17.

RENT—Distress for rent—Charges—Man in possession — Distress for sum not exceeding 20*l.* - - - - **1103**
See LANDLORD AND TENANT. 2.

—— Lease — House let to kept woman — Immoral purpose — Right to recover rent - - - - - - - **506**
See LANDLORD AND TENANT. 4.

RENT-CHARGE—*Mortgage of Land subject to—Possession of Land not taken by Mortgagee—Liability of Mortgagee for Rent.*

A mortgagee in fee of land which is subject to a rent-charge is personally liable to pay the rent-charge although he has never been in possession. CUNDIFF *v.* FITZSIMMONS **Div. Ct. 513**

RENT-CHARGE—*continued.*

—— Mortgage of land subject to—Possession of land not taken by mortgagee—Liability of mortgagee for rent - - - **513**
See RENT-CHARGE.

REPAIRS — Old building — Natural decay — Dangerous structure notice—Rebuilding —Liability of lessee - - - **905**
See LANDLORD AND TENANT. 6.

—— Waterworks—Communication pipe—Stopcock box—Liability of householder to repair—Power to break up street for that purpose - - - - **845**
See LONDON. 4.

REPRESENTATION OF THE PEOPLE ACT, 1832 - - - - - - **166**
See PARLIAMENT.

RESCISSION — Lease — Executed contract — Innocent misrepresentation - - **666**
See LANDLORD AND TENANT. 3.

RETAINER—Right of—Administrator undischarged bankrupt - - - **317**
See BANKRUPTCY. 2.

—— Solicitor — Costs — Liability of solicitor personally to pay plaintiff's costs **966**
See SOLICITOR. 2.

REVENUE—*Carriage—Licence — Exemption — "Used solely for the conveyance of goods or burden"—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4, *sub-s.* 3.

By s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, a carriage licence is not required for a "cart . . . . which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry."

Where a cart is used only for the purpose of taking goods to market to be sold, the fact that the persons who are intended to sell the goods at the market are conveyed there in the cart along with the goods will not take away the cart's title to exemption.

If a cart has been constructed with a view to its being used only for the exempted purposes, the mere fact that it is capable of being used for other purposes will not deprive it of the exemption. COOK *v.* HOBBS - **Div. Ct. 14**

2. —— *Carriage—Licence — Vehicle "used solely for the conveyance of goods or burden"—Exemption—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4, *sub-s.* 3.

By s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, a vehicle which, being constructed for that purpose, "is used solely for the conveyance of any goods or burden in the course of trade or husbandry" is exempted from the requirement of a carriage licence.

The appellants were the owners of a dairy farm which they placed in the charge of a bailiff. They had at the farm a milk van specially constructed for the conveyance of their milk churns from the farm to the railway station. For this van they held no carriage licence. On one occasion the bailiff without the knowledge or

REVENUE—*continued.*
authority of the appellants used the van for the purpose of driving to a town some miles distant and bringing back his wife and some friends who had been to a place of amusement there. The appellants were charged with keeping the van without a licence :—

Held that, as they had placed the bailiff in charge of the farm generally, they were responsible for his act in using the van for the purpose for which he did, and that they consequently failed to bring themselves within the exemption and were liable to be convicted. STRUTT *v.* CLIFT - - - - - - - **Div. Ct. 1**

3. —— *Grant by Charter of Revenue Fine to Corporation—Repeal of Grant by Revenue Acts—Excise Management Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 53), *s.* 103—*Inland Revenue Act*, 1868 (31 *&* 32 *Vict. c.* 124), *s.* 1—*Inland Revenue Regulation Act*, 1890 (53 *&* 54 *Vict. c.* 21), *ss.* 11, 33.

The Crown is entitled under s. 33 of the Inland Revenue Regulation Act, 1890, to revenue fines, notwithstanding any grant of those fines previously made by charter to any corporation. ATTORNEY-GENERAL *v.* EXETER CORPORATION - - - **Hamilton J. 1092**

4. —— *Stamp*—"*Marketable Security*" —*Debentures purporting to create Charge on Ships —Previous Mortgage of Ships to Trustees for Debenture-holders — Deed of Covenants with Trustees for Payment of Sums secured by Debentures—Liability of Debentures to Stamp Duty—Instrument for Disposition of Interest or Property in Ship—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule*, "*Marketable Security*," "*General Exemptions from all Stamp Duties*," *clause* 2.

A company incorporated under the Companies Acts, 1862 to 1888, issued a debenture for 1000*l.* and interest thereon, which was a marketable security within the meaning of the First Schedule to the Stamp Act, 1891. The debenture was one of a series issued by the company for securing an aggregate amount not exceeding 20,000*l.* It contained a covenant by the company with the registered holder for the time being to pay the 1000*l.* and interest. Then followed words whereby the company purported to charge with the payment of the 1000*l.* and interest three steamships, and a proviso entitling the company to the use and employment of the steamships in the usual course of their business until default were made in payment of the principal money or interest secured by the debentures, whereupon the debenture was to be immediately enforceable, with a limitation that the liberty to use and employ the steamships was not to be held to authorize the creation of any mortgage or charge of or upon the steamships or any part or share thereof having priority over the charge purported to be created by the debenture. The debenture also contained a declaration that it was subject to and with the benefit of the conditions indorsed thereon. Those conditions provided, inter alia, that the series of debentures so issued should rank pari passu, without any preference or priority of one

REVENUE—*continued.*
debenture over another, as a first charge on the steamships ; that warrants for the payment of interest should be sent by post to the registered holders of the debentures ; and that a register of debentures for the entry of transfers on the register free from equity should be kept. By the conditions it was also declared that "the holders for the time being of this debenture and the other debentures of this issue (in addition to the charge hereby respectively created) shall be entitled pari passu to the benefit of a deed of covenants, dated December 22, 1909, ... and three several mortgages of even date therewith." The three mortgages of December 22, 1909, were respectively mortgages of the three steamships and were in the form contained in Part I. of the First Schedule to the Merchant Shipping Act, 1894, and the deed of covenants of even date recited these mortgages (which were granted by the company to certain trustees for the debenture-holders) and contained covenants by the company with those trustees with regard to the payment of the principal money and interest intended to be secured by the debentures, and other covenants and provisions for the maintenance of the security and for its realization in case of default :—

Held, that the debenture did not create any charge beyond that which was already in existence under the mortgages and deed of covenants ; that if it transferred any interest it did so only contingently, in an event which had not happened, and not as its substantial object ; that it was therefore not an instrument for the disposition of an interest in a ship within the meaning of clause 2 of the "General Exemptions from all Stamp Duties" contained in the First Schedule to the Stamp Act, 1891 ; and that consequently it was liable to stamp duty under the head "Marketable Security," clause 1, contained in the First Schedule to the Act. DEDDINGTON STEAMSHIP COMPANY *v.* INLAND REVENUE COMMISSIONERS - **Hamilton J. 1078**

REVIEW—Workmen's compensation — Weekly payments.
See under EMPLOYER AND WORKMAN.

ROYAL NAVAL RESERVE—Member of—Seaman—Workmen's compensation - **376**
See EMPLOYER AND WORKMAN. 14.

RULES OF THE SUPREME COURT:—
—— **Order XVII., r. 4**—*Change of Parties by Death, &c.* - - - - - - **317**
See BANKRUPTCY. 2.

—— **Order XXV., rr. 4, 5**—*Proceedings in lieu of Demurrer* - - - - - - **410**
See PRACTICE.

—— **Order XXXVIII., r. 16**—*Affidavits and Depositions* - - - - - - **317**
See BANKRUPTCY. 2.

—— **Order XLII., r. 23**—*Execution* - - **317**
See BANKRUPTCY. 2.

—— **Order XLII., r. 24**—*Execution* - - **701**
See SOLICITOR. 3.

SALE OF GOODS—*C. i. f. Contract—"Terms net cash"—Right of Buyer to Inspection before Payment—Payment against Shipping Documents—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18 (*r.* 5), 28, 34.

A contract for the sale of hops to be shipped from the Pacific Coast to this country provided that the buyers should "pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull. Terms net cash." The contract contained no term expressly providing for payment against shipping documents:—

Held (by Vaughan Williams L.J. and Farwell L.J., Kennedy L.J. dissenting), that, on a contract in the above terms, the buyers were not bound to pay for the hops on tender of the shipping documents, but were entitled to refuse payment until, upon the arrival of the hops, they had been given an opportunity for inspection of them.

Decision of Hamilton J., [1911] 1 K. B. 214, reversed. BIDDELL BROTHERS *v.* E. CLEMENS HORST COMPANY - - - - **C. A. 934**

2. —— *Contract not to be performed within a Year—Writing signed by Party to be charged—Statute of Frauds*, 1677 (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

Sect. 4 of the Statute of Frauds (so far as relates to agreements not to be performed within a year) applies to agreements for the sale of goods and is not repealed by the Sale of Goods Act, 1893. Therefore an agreement for the sale of goods is not taken out of the operation of the above provision of the Statute of Frauds by reason of there having been an acceptance and actual receipt by the buyer of part of the goods so sold.

Decision of Walton J., [1910] 2 K. B. 776, affirmed. PRESTED MINERS COMPANY, LIMITED *v.* GARDNER, LIMITED - - - **C. A. 425**

—— Contract—Act done by plaintiff in mitigation of damages - - - - - **575**
See DAMAGES.

—— Fraud—Voidable contract—Pledge by purchaser - - - - - - - **463**
See CONTRACT. 1.

—— Merchandise marks.
See under MERCHANDISE MARKS.

SCHOOLS—*Non-attendance of Child—Breach of By-laws—Reasonable Excuse—Beneficial Employment of Child—Onus of Proof—Function of Local Education Authority—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.

By-laws were made by a local education authority under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, by one of which it was provided that "The parent of every child of not less than five nor more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance."

By another by-law it was provided that "A child between thirteen and fourteen years of age shown to the satisfaction of the local authority to be beneficially employed shall not be required to attend school" if certain other conditions were complied with.

By the direction of the local education authority a complaint was preferred before justices against a parent for unlawfully committing a breach of the by-laws by not causing his daughter, a child between five and fourteen years of age, to attend school. Before the justices the parent stated in substance that he had kept the girl, who had attained the age of thirteen years and a half, at home owing to sickness in his family in order that she might help in nursing. The justices dismissed the complaint upon the ground that the prosecution had not proved that the child was not beneficially employed, and that if she were employed in nursing the sick it was beneficial employment. On appeal to a Divisional Court:—

Held, that the decision of the justices was wrong upon the ground (1.) that the onus was on the parent of proving affirmatively that the child was beneficially employed, and (2.) that under the by-laws the education authority and not the justices were the judges of whether a particular occupation was or was not a beneficial employment, and that in giving their decision upon that point the justices had usurped the function of the education authority. HOLLOWAY *v.* CROW - - - - **Div. Ct. 636**

2. —— *Non-provided School—Duty to maintain and keep efficient—Appointment and Payment of Caretaker—Management of School—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

The managers of a non-provided public elementary school, in the discharge of the duties of management conferred upon them by s. 7, sub-s. 7, of the Education Act, 1902, are entitled, without interference from the local education authority, to cause the school to be properly cleaned and attended to, and the local education authority are bound to pay to the managers the reasonable expenses incurred by them of cleaning and attending to the school. GILLOW *v.* DURHAM COUNTY COUNCIL - **Hamilton J. 222**

SEAL—Summons—Absence of seal—Defect in form—Summary jurisdiction - **880**
See JUSTICES. 3.

SEAMAN.
See under SHIPPING.

SECRET PROFIT—Fraudulent promoter—Bankruptcy of promoter—Proof - **95**
See BANKRUPTCY. 4.

SHARES—Company,
See under COMPANY.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SHEEP—Dartmoor Forest—Newtake—Duty to fence—Sheep damage feasant—Impounding—Pound more than three miles distant—Distress - - **649**
See COMMON.

SHERIFF—"Costs of execution"—Sheriff's costs of interpleader - - - **104**
See BANKRUPTCY. 6.

SHERIFF—*continued.*

—— Judgment debtor—Interpleader—Sale by sheriff—Costs of execution - - 641
See BANKRUPTCY. 5.

SHIPPING — *Charterparty — Demurrage — "Working Day" — Custom of Port — "Surf Day"—Construction of Charterparty.*

A charterparty, under which the plaintiffs' ship was chartered to carry a cargo of lumber from Vancouver to Iquique, provided that discharge was "to be given with dispatch according to the custom of the port of discharge, but not less than thirty 'mille' per working day." In an action by the plaintiffs against the holders of a bill of lading for the cargo, which incorporated the conditions of the charterparty, for demurrage of the ship through default of the defendants in not discharging at least thirty "mille" per working day, the defendants in their statement of defence pleaded with regard to a certain number of days in respect of which demurrage was claimed, in substance, as follows: that the plaintiffs or their agents knew, or ought to have known, the customs of the port of Iquique when they signed the charterparty; that the customary mode of discharge at Iquique is that ships lie in the bay, and are discharged by means of lighters, which carry the cargo from the ship to the beach; that the same number of days as before mentioned, out of the period between the commencement of the lay days at Iquique and the completion of the discharge of the ship, were "surf days," i.e., days on which the surf on the beach at Iquique is so heavy that "the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable"; that "by the established custom of the port of Iquique 'surf days' are not working days, and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on 'surf days,' i.e., days which appear as 'surf days' in the register book kept by the captain of the port at his office"; and that, by the custom of the port of Iquique and of the trade of importing lumber to that port, such days are not within the meaning of the term "working days" as used in such a charterparty as that in question.

An order having been made for the trial of the following question as a preliminary point of law, namely, whether the above-mentioned pleading (assuming for the purpose of the preliminary point of law only that the allegations of fact therein were true) constituted any defence to the plaintiffs' claim, on the trial of that question Hamilton J., following the ruling of Walton J. in *Bennetts & Co.* v. *Brown*, [1908] 1 K. B. 490, gave judgment for the plaintiffs, on the ground that the alleged custom was too uncertain and unreasonable to be admissible to vary the ordinary meaning of the words "working day" in a charterparty. On appeal:—

Held, reversing his decision, that, on the assumption that the allegations of fact in the defence were true, the alleged custom was a valid custom, and the words "working day" in the charterparty must be interpreted in accordance with it, and that the defendants were therefore entitled to judgment. BRITISH AND MEXICAN SHIPPING COMPANY, LIMITED *v.* LOCKETT BROTHERS & CO., LIMITED **C. A. 264**

SHIPPING—*continued.*

2. —— *Contract of Affreightment—Bill of Lading—Lien for Dead Freight—Deviation—Necessity for Deviation—Unseaworthiness.*

Where a ship deviates from her voyage by putting into a port of refuge and the deviation is reasonably necessary for the safety of the ship and cargo, but the necessity for the deviation is due to the default of the shipowner in sending the ship to sea in an unseaworthy condition, the shipowner is debarred from asserting against the cargo owners a lien upon the cargo for dead freight conferred upon him by the bills of lading.

The principle of *Strang, Steel & Co.* v. *A. Scott & Co.*, (1889) 14 App. Cas. 601, applied.

Decision of Walton J., [1910] 2 K. B. 309. Appeal allowed. Cross-appeal dismissed. KISH *v.* TAYLOR - - - - - **C. A. 625**

3. —— *Seaman — Desertion in Australian Port—Prohibited Immigrant—Fine imposed on Master—Expenses caused by Absence due to Desertion—Reimbursement—Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

A ship in the course of a voyage arrived at Brisbane, at which port a Chinaman, who was a member of the crew, deserted. In respect of this desertion the master of the ship was fined 100*l.* by a Court of summary jurisdiction at Brisbane under an Act of the Commonwealth of Australia which imposed that penalty upon the master of any ship from which a prohibited immigrant, as the Chinaman was, entered the Commonwealth:—

Held, that the fine of 100*l.* was not "an expense" caused to the master of the ship by the absence of the seaman due to desertion within s. 28, sub-s. 1 (*b*), of the Merchant Shipping Act, 1906, and that the master was, therefore, not entitled to be reimbursed out of the wages of the seaman. HALLIDAY *v.* TAFFS **Div. Ct. 594**

4. —— *Seaman—Neglect of Duty—Omission to do Act requisite for preserving Ship—Liability to Penalty—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 220.

By s. 220 of the Merchant Shipping Act, 1894, "If a master, seaman, or apprentice belonging to a British ship . . . . by neglect of duty . . . . (*b*) . . . . omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage" he shall be guilty of a misdemeanour:—

Held, that where a ship comes into collision with another vessel as the result either of the act of the master in placing the look-out man in such a position on deck that his view ahead is partially obstructed, or of the failure of the look-out man to keep a good look-out, neither the act of the master nor the neglect of the look-out man is a neglect of duty of the kind contemplated by the section. DEACON *v.* EVANS **Div. Ct. 571**

SHIPPING—*continued.*

5. —— *Seaman's Articles—Agreement for a Voyage—End of Voyage.*

A seaman signed articles "for a voyage of not exceeding two years' duration . . . . to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master":—

Held that, although under such articles the voyage may come to an end without any express election by the master, and although, if the voyage has in fact so come to an end, the master cannot prolong its continuance by requiring the seaman to go on to a further port, the mere facts that the ship has discharged her cargo, that she has arrived in a home port, and that she has there taken on board bunker coal required for a future voyage do not conclusively shew that the voyage has so terminated. HAYLETT *v.* THOMPSON - - - **Div. Ct. 311**

—— Sale of goods.
See under SALE OF GOODS.

—— Sale of goods—Payment against shipping documents - - - - - **934**
See SALE OF GOODS. 1.

—— Seaman — Workmen's compensation — Member of Royal Naval Reserve - **376**
See EMPLOYER AND WORKMAN. 14.

—— Stamp—"Marketable security"—Debentures purporting to create charge on ships - - - - - - **1078**
See REVENUE. 4.

—— Workmen's compensation—Seaman—Return to ship - - - - - **523**
See EMPLOYER AND WORKMAN. 15.

SIGNATURE—Promissory note—Signature procured by duress — Burden of proof
See NEGOTIABLE INSTRUMENT. **854**

SOLICITOR—*Bill of Costs—Delivery of Bill—One Month before Action—"Sent by the post"—Time—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

By s. 37 of the Solicitors Act, 1843, no solicitor shall commence any action for the recovery of any fees, charges, or disbursements "until the expiration of one month after such . . . . solicitor . . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode," a bill of such fees, charges, and disbursements.

By s. 48 "month" means calendar month.

Held, that "month" means a clear month; and that a bill is not "sent by the post" to the party to be charged one month before action unless it is posted at such a time that it will in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action, reckoning the month as exclusive of the days on which the bill is delivered and the action is commenced. BROWNE *v.* BLACK - **Div. Ct. 975**

SOLICITOR—*continued.*

2. —— *Costs—Liability—Retainer to conduct Defence to an Action—Implied Warranty of Existence of Authority—Non-existing Defendant—Liability of Solicitor personally to pay Plaintiff's Costs.*

A solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority. SIMMONS *v.* LIBERAL OPINION LIMITED. *In re* DUNN - - - **C. A. 966**

3. —— *Costs—Taxation—Default in Delivery of Bill of Costs—Motion for Attachment—Order for Payment of Costs of Motion—Enforcement by Action—Rules of the Supreme Court, Order* XLII., *r.* 24.

An order was made by a judge in the Chancery Division that the defendant, a solicitor, should pay to the plaintiff the costs of a motion by the plaintiff for the attachment of the defendant for contempt of Court in not having delivered to the plaintiff a bill of costs pursuant to an order for taxation of costs. The costs of the motion having been taxed, the plaintiff sued the defendant in the King's Bench Division to recover the amount thereof:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the order for costs was not made in a criminal or quasi-criminal matter, and that the action was maintainable.

Judgment of Darling J., [1910] 2 K. B. 9, affirmed.

In re Freston, (1883) 11 Q. B. D. 545, considered. SELDON *v.* WILDE - - **C. A. 701**

4. —— *Registrar of County Court—Defendant in Person—Taxation—Costs as Solicitor—Registrar acting as Solicitor in his own Court—Taxation by Registrar of his own Bill of Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 41, 43, 118—*County Court Rules*, 1903—1908, *Order* LIII., *r.* 25.

Sect. 41 of the County Courts Act, 1888, which provides that a registrar of a county court shall not be engaged as solicitor for any party in any proceeding in the registrar's court, does not prevent a registrar, who is a solicitor, from defending himself in person in an action brought against him in his own Court, or from recovering from the plaintiffs in the action such costs as a solicitor defendant is entitled to on taxation, under Order LIII., r. 25, of the County Court Rules, 1903—1908; and by reason of s. 118 of the Act, which provides that all costs shall be taxed by the registrar of the Court in which they were incurred, the registrar's bill of costs must, of necessity, be taxed by the registrar himself.

The defendant was the registrar of a county court and was also a practising solicitor. The plaintiffs brought an action against him in that Court, alleging negligence by him in his official capacity. The defendant acted as his own solicitor in the action and was represented by counsel at the trial. The county court judge gave judgment for the defendant with costs. The defendant brought in his bill of costs for

SOLICITOR—*continued.*
taxation and gave notice of a taxation before himself. The plaintiffs' solicitor attended the taxation under protest, and, on the taxation, the defendant disallowed several items. The plaintiffs applied to the county court judge to review the taxation, and on the review the judge taxed off two further items:—
Held (affirming the decision of a Divisional Court, Phillimore and Avory JJ., [1911] 1 K. B. 87), that the taxation had to take place of necessity before the defendant himself; that the defendant appeared in person and did not lose his costs because he was also registrar and a solicitor; that the county court judge had not taxed on any wrong principle; and, further, that by their application to the county court judge the plaintiffs had waived their objection to the jurisdiction. H. TOLPUTT & Co. *v.* MOLE C. A. 836

5. —— *Undertaking to pay Money to Person not Client—No Misconduct on Part of Solicitor, nor Legal Proceedings pending—Disciplinary Jurisdiction of the Court—Summary Order for Payment.*
On appeal from the judgment of Hamilton J., reported [1910] 2 K. B. 296. UNITED MINING AND FINANCE CORPORATION, LIMITED *v.* BECHER - - - - - - C. A. 840

STAMP—Insurance (Marine)—Payment of loss—Penalty—Stamp objection—Costs - 137
See INSURANCE (MARINE).

—— "Marketable security"—Debentures purporting to create charge on ships - 1078
See REVENUE. 4.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMARY JURISDICTION RULES, 1886, r. 31
See JUSTICES. 3. 880

SUMMONS—Absence of seal—Defect in form—Summary jurisdiction - - 880
See JUSTICES. 3.

STATUTES:—

1 & 2 Ph. & M. c. 12, s. 1 - - - 649
See COMMON.

1677.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* - 425
See SALE OF GOODS. 2.

1817.

57 Geo. 3, c. 93, s. 1, Schedule—*Distress (Costs)*
See LANDLORD AND TENANT. 2. 1130

1827.

7 & 8 Geo. 4, c. 53, s. 103—*Excise Management*
See REVENUE. 3. 1092

1831.

1 & 2 Will. 4, c. 32, ss. 4, 27—*Game* - 9
See GAME.

STATUTES—*continued.*

1832.

2 & 3 Will. 4, c. 45, s. 24—*Representation of the People* - - - - - - 166
See PARLIAMENT.

1839.

2 & 3 Vict. c. 71, s. 40—*Metropolitan Police* - - - - - - 499
See BAILMENT.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - - 975
See SOLICITOR. 1.

1845.

8 & 9 Vict. c. 18, s. 34—*Lands Clauses* - 551
See LANDS CLAUSES ACTS.

8 & 9 Vict. c. 109, s. 18—*Gaming* - - 296
See GAMING.

1846.

9 & 10 Vict. c. 66, ss. 1, 3—*Poor Removal* 748
See POOR LAW.

1847.

10 & 11 Vict. c. 17, s. 72—*Waterworks Clauses* - - - - - - 289
See WATER.

1848.

11 & 12 Vict. c. 42, s. 17—*Indictable Offences* - - - - - - 159
See JUSTICES. 1.

—— —— s. 18 - - - - - - 612
See JUSTICES. 2.

11 & 12 Vict. c. 43, s. 1—*Summary Jurisdiction* - - - - - - 880
See JUSTICES. 3.

11 & 12 Vict. c. 111, s. 1—*Poor Removal* - 748
See POOR LAW.

1853.

16 & 17 Vict. c. 119, ss. 1, 3—*Betting* - 70
See CRIMINAL LAW. 2

1854.

17 & 18 Vict. c. 31, s. 2—*Railway and Canal Traffic* - - - - - - 386, 534
See RAILWAY. 1, 3.

1855.

18 & 19 Vict. c. 120, s. 105—*Metropolis Management* - - - - - 60
See LONDON. 3.

1861.

24 & 25 Vict. c. 96, s. 31—*Larceny* - 260
See CRIMINAL LAW. 5.

1862.

25 & 26 Vict. c. 68, ss. 7, 8—*Fine Arts Copyright* - - - - - - 771
See COPYRIGHT.

STATUTES—*continued.*

1865.

28 & 29 Vict. c. 125—*Dockyard Ports Regulation* - - - - - - - **171**
See HARBOUR.

1867.

30 & 31 Vict. c. 35, s. 6—*Criminal Law* - **159**
See JUSTICES. 1.

1868.

31 & 32 Vict. c. 124, s. 1—*Inland Revenue* **1092**
See REVENUE. 3.

1870.

33 & 34 Vict. c. 75, s. 74—*Elementary Education* - - - - - - **636**
See SCHOOLS. 1.

1872.

35 & 36 Vict. c. 93, s. 10—*Pawnbrokers* - **792**
See PAWNBROKER.

1875.

38 & 39 Vict. c. 55, s. 211, sub-s. 1 (*a*)—*Public Health* - - - - - - **83**
See RATES. 1.

—— —— s. 233 - - - - - - **680**
See CORPORATION.

1876.

39 & 40 Vict. c. 61, ss. 34, 35—*Divided Parishes and Poor Law* - - **748**
See POOR LAW.

1878.

41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives* - - - - - - **734**
See HIGHWAY.

1879.

42 & 43 Vict. c. 49, ss. 12, 24, 27—*Summary Jurisdiction* - - - **612**
See JUSTICES. 2.

1881.

44 & 45 c. 41, s. 19, sub-ss. 1, 2, 3; s. 24, sub-ss. 2, 6—*Conveyancing and Law of Property* - - - - - - **806**
See COMPANY. 2.

1882.

45 & 46 Vict. c. 61, s. 30, sub-s. 2—*Bills of Exchange* - - - - - - **854**
See NEGOTIABLE INSTRUMENT.

1883.

46 Vict. c. 3, ss. 2, 7—*Explosive Substances* - - - - - - **964**
See CRIMINAL LAW. 8.

46 & 47 Vict. c. 52, s. 46—*Bankruptcy* - **104**
See BANKRUPTCY. 6.

—— —— s. 104 - - - - - - **841**
See BANKRUPTCY. 1.

46 & 47 Vict. c. 61, s. 61—*Agricultural Holdings (England)* - - - - **797**
See LANDLORD AND TENANT. 1.

STATUTES—*continued.*

1884.

47 & 48 Vict. c. 9, s. 2—*Bankruptcy Appeals (County Courts)* - - - - **841**
See BANKRUPTCY. 1.

1887.

50 & 51 Vict. c. 28, s. 5, sub-ss. 1, 2—*Merchandise Marks* - - - - - - **927**
See MERCHANDISE MARKS.

50 & 51 Vict. c. 29, s. 6—*Margarine* - **566**
See MARGARINE.

50 & 51 Vict. c. 57, ss. 5, 6—*Deeds of Arrangement* - - - - - - - **317**
See BANKRUPTCY. 2.

1888.

51 & 52 Vict. c. 8, s. 4, sub-s. 3—*Customs and Inland Revenue* - - - - **1, 14**
See REVENUE. 1, 2.

51 & 52 Vict. c. 21, s. 8—*Law of Distress Amendment* - - - - - **1103**
See LANDLORD AND TENANT. 2.

51 & 52 Vict. c. 25, s. 25—*Railway and Canal Traffic* - - - - - - **657**
See RAILWAY. 2.

51 & 52 Vict. c. 41, s. 24, sub-s. 2 (*f*); s. 80—*Local Government* - - - **717**
See LOCAL GOVERNMENT.

51 & 52 Vict. c. 43, ss. 41, 43, 118—*County Courts* - - - - - - **836**
See SOLICITOR.

—— —— s. 67 - - - - - - **666**
See LANDLORD AND TENANT. 3.

1889.

52 Vict. c. 10, s. 1. sub-ss. 2, 3—*Commissioners for Oaths* - - - - - - **317**
See BANKRUPTCY. 2.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - **783**
See ARBITRATION.

1890.

53 & 54 Vict. c. 5, ss. 283, 287—*Lunacy* **437**
See LUNACY.

53 & 54 Vict. c. 21, ss. 11, 33—*Inland Revenue Regulation* - - - - - **1092**
See REVENUE. 3.

53 & 54 Vict. c. 71, s. 1—*Bankruptcy* - **317**
See BANKRUPTCY. 2.

—— —— s. 11 - - - - - - **104**
See BANKRUPTCY. 6.

—— —— s. 11 - - - - - - **641**
See BANKRUPTCY. 5.

1891.

54 & 55 Vict. c. 39, ss. 93, 97—*Stamps* - **137**
See INSURANCE (MARINE).

—— —— First Schedule, "Marketable Security" - - - - - - - **1078**
See REVENUE. 4.

54 & 55 Vict. c. ccxxii., Sched. I., s. 2 (*b*)—*Great Western Railway Company (Rates and Charges) Order Confirmation)* - - - - - - **386**
See RAILWAY. 1.

STATUTES—*continued.*

1893.

56 & 57 Vict. c. 71, s. 4—*Sale of Goods* - **425**
See SALE OF GOODS. 2.

—— —— ss. 16, 18 (r. 5), 28, 34 - - **934**
See SALE OF GOODS. 1.

—— —— s. 23 - - - - - - **463**
See CONTRACT. 1.

1894.

57 & 58 Vict. c. 16, s. 1, sub-s. 1 (*a*)—*Judicature (Procedure)* - - - - **841**
See BANKRUPTCY. 1.

57 & 58 Vict. c. 60, s. 220 — *Merchant Shipping* - - - - - - **571**
See SHIPPING. 4.

1895.

58 & 59 Vict. c. 27, ss. 1, 3, 4—*Market Gardeners' Compensation* - - - **797**
See LANDLORD AND TENANT. 1.

1898.

61 & 62 Vict. c. 29, s. 12—*Locomotives* - **734**
See HIGHWAY.

61 & 62 Vict. c. cxxxvii., s. 3—*London Building* - - - - - - - **740**
See LONDON. 2.

1899.

62 & 63 Vict. c. 51, s. 6—*Sale of Food and Drugs* - - - - - - **566**
See MARGARINE.

1900.

63 & 64 Vict. c. 51, s. 2, sub-s. 2—*Moneylenders* - - - - - - **824**
See MONEY-LENDER.

—— —— s. 6 (*a*) - - - - - **792**
See PAWNBROKER.

1901.

1 Edw. 7, c. 22, s. 10—*Factory and Workshop* - - - - - - **546**
See FACTORY. 2.

—— —— s. 13 - - - - - - **145**
See FACTORY. 1.

1902.

2 Edw. 7, c. 42, s. 7—*Education* - - **222**
See SCHOOLS. 2.

1903.

3 Edw. 7, c. 36, s. 2, sub-s. 4; s. 4, sub-s. 1 (*c*), sub-s. 2—*Motor Car* - - - **603**
See MOTOR CAR.

1905.

5 Edw. 7, c. ccix., s. 12—*London Building* **235**
See LONDON. 1.

1906.

6 Edw. 7, c. 43, s. 2—*Street Betting* - **57**
See BETTING.

STATUTES—*continued.*

6 Edw. 7, c. 48, s. 28—*Merchant Shipping* - - - - - - **594**
See SHIPPING. 3.

6 Edw. 7, c. 58, s. 1—*Workmen's Compensation* - - - - - - **988**
See EMPLOYER AND WORKMAN. 3.

—— —— s. 1, sub-s. 1 - - **997, 1029, 1036**
See EMPLOYER AND WORKMAN. 1, 2, 8.

—— —— s. 1, sub-s. 1 - - - - **351**
See EMPLOYER AND WORKMAN. 7.

—— —— s. 1, sub-s. 1 - - - - **523**
See EMPLOYER AND WORKMAN. 15.

—— —— s. 1, sub-s. 1; Sched. I. (1.) (*b*), (3.) - - - - - **1048**
See EMPLOYER AND WORKMAN. 4.

—— —— s. 2 - - - - - - **982**
See EMPLOYER AND WORKMAN. 5.

—— —— s. 3, sub-s. 1 - - - - **24**
See EMPLOYER AND WORKMAN. 3.

—— —— s. 6 - - - - - - **114**
See EMPLOYER AND WORKMAN. 9.

—— —— s. 9, sub-s. 1; Sched. I., par. 2 (*b*) **376**
See EMPLOYER AND WORKMAN. 14.

—— —— s. 13 - - - - - - **360**
See EMPLOYER AND WORKMAN. 17.

—— —— s. 13; Sched. I., par. 1 (*a*) (i.) and (ii.) - - - - - - **250**
See EMPLOYER AND WORKMAN. 6.

—— —— s. 13, Sched. I., par. 1 (*a*) (ii.) - **341**
See EMPLOYER AND WORKMAN. 5.

—— —— Sched. I., par. 3 - - - **1004**
See EMPLOYER AND WORKMAN. 13.

—— —— Sched. I., pars. 3, 16 - - **1009**
See EMPLOYER AND WORKMAN. 12.

—— —— Sched. I., par. 19; Sched. II., par. 9 - - - - - - - **30**
See EMPLOYER AND WORKMAN. 11.

1907.

7 Edw. 7, c. 9—*Territorial and Reserve Forces*) - - - - - - **43**
See RATES. 2.

7 Edw. 7, c. 17, ss. 1, 6—*Probation of Offenders*
See CRIMINAL LAW. 3. **77**

7 Edw. 7, c. 21, s. 8—*Butter and Margarine*
See MARGARINE. **566**

7 Edw. 7, c. 23, s. 1, sub-ss. 6, 7; s. 4, sub-s. 2 and s. 9—*Criminal Appeal* - - **461**
See CRIMINAL LAW. 1.

—— —— s. 4, sub-s. 1 - - - - **964**
See CRIMINAL LAW. 8.

7 Edw. 7, c. clxxi., ss. 8, 19 — *Metropolitan Water Board (Charges)* - - **845**
See LONDON. 4.

1908.

8 Edw. 7, c. 28, s. 42, sub-s. 2—*Agricultural Holdings* - - - - - - **797**
See LANDLORD AND TENANT. 1.

STATUTES—*continued.*
8 Edw. 7, c. 45, ss. 1, 2—*Punishment of Incest* *See* CRIMINAL LAW. 1 461
8 Edw. 7, c. 53, ss. 1, 4—*Distress* - - 19 *See* DISTRESS.
8 Edw. 7, c. 55, s. 2—*Poisons and Pharmacy* *See* POISON. 520
8 Edw. 7, c. 66—*Public Meeting* - - 337 *See* CRIMINAL LAW. 6
8 Edw. 7, c. 69, ss. 26, 64—*Companies (Consolidation)* - - - - - - 588 *See* COMPANY. 3.

1909.

9 Edw. 7, c. 30, s. 2—*Cinematograph* - 445 *See* CINEMATOGRAPH.

1909–1910.

10 Edw. 7, c. 8, Form IV—*Finance* (1909–1910) *Act*, 1910 - - - - - - 410 *See* PRACTICE.

II. COLONIAL STATUTES:

New Zealand: Statutes of:
New Zealand Statutes, No. 12 of 1908 (8 Edw. 7), ss. 53, 61 - - - 896 *See* BANKRUPTCY. 3.

STAYING PROCEEDINGS—Arbitration—Attack on conduct of arbitrator—Discretion of Court - - - - - - - 783 *See* ARBITRATION.

STOCKBROKER—Gaming or wagering contract—Payment of deposit—Repayment of deposit in any event - - - 296 *See* GAMING.

STREET—New street—Paving expenses - 60 *See* LONDON. 3.

STREET BETTING. *See* under BETTING.

STRIKING OUT PLEADINGS—Reasonable cause of action—Relief against the Crown—Declaratory judgment — Attorney-General defendant - - - 410 *See* PRACTICE.

SUMMARY JURISDICTION—Justices. *See* under JUSTICES.

TAXATION—Solicitor's costs. *See* under SOLICITOR.

TENANT—Landlord and. *See* under LANDLORD AND TENANT.

TERRITORIAL FORCE—Poor rate—Exemption *See* RATES. 2. 43

THEFT—Insurance (Burglary)—Exception of theft by member of business staff—Accessory before the fact - - 426 *See* INSURANCE (BURGLARY).

THIRD PARTY — Action for indemnity by employer against — Workmen's compensation - - - - - - 114 *See* EMPLOYER AND WORKMAN. 9.

THIRD PARTY—*continued.*
—— Bailment—Warehouseman — Negligence — Claim by third party to goods bailed—Duty of bailee—Notice of claim to bailor - - - - - - 499 *See* BAILMENT.

—— Cause of action—Tow sunk by negligence of third party—Loss to tug owner of towage remuneration - - 243 *See* NEGLIGENCE.

TIME—Appealing, Order extending time for—Practice - - - - - - 841 *See* BANKRUPTCY. 1.

—— Solicitor — Delivery of bill of costs — One "month" before action - - 975 *See* SOLICITOR. 1.

TOW—Cause of action—Tow sunk by negligence of third party—Loss to tug owner of towage remuneration - - 243 *See* NEGLIGENCE.

TRADE DESCRIPTION—Application of to goods *See* MERCHANDISE MARKS. 927

TRAFFIC—Highways and locomotives—Extraordinary traffic. *See* under HIGHWAY.

TRESPASS—Harbour—Rights of navigation—Right of shipowner to moor coal hulk in navigable harbour - - 171 *See* HARBOUR.

TRUSTEE IN BANKRUPTCY. *See* under BANKRUPTCY.

UNDERLEASE—Forfeiture — Relief — Costs — Breach by underlessee - - - 35 *See* LANDLORD AND TENANT. 5.

UNDERTAKING—Solicitor—Undertaking to pay money to person not client—No misconduct on part of solicitor, nor legal proceedings pending—Summary order for payment - - - - 840 *See* SOLICITOR. 5.

VIEW — Obstruction of — Public nuisance — Special damage—Pecuniary loss - 869 *See* NUISANCE.

VOYAGE—Ship—Seaman's articles—Agreement for a voyage—End of voyage - 311 *See* SHIPPING. 5.

WAGERING—Gaming or wagering contract—Stockbroker—Payment of deposit 296 *See* GAMING.

WAREHOUSEMAN — Negligence — Claim by third party to goods bailed—Duty of bailee—Notice of claim to bailor - 499 *See* BAILMENT.

WATER—Waterworks—Communication pipe—Stop-cock box—Liability of householder to repair—Power to break up street for that purpose - - - - - 845 *See* LONDON. 4.

WATERWORKS.
See under WATER.

—— Poor rate—Liability to—Gathering ground for waterworks - - - - - **1057**
See RATES. 3.

WORDS—"Alteration" - - - - - **771**
See COPYRIGHT.

WORDS—*continued.*
—— "Incapacity for work" - - - - **1048**
See EMPLOYER AND WORKMAN. 8.
—— "Month" - - - - - - - **975**
See SOLICITOR. 1.
—— "Open cover" - - - - - - **137**
See INSURANCE (MARINE).

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

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